

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 431.

THE NORTH AMERICAN COMMERCIAL COMPANY,  
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States circuit court of appeals for the second circuit.

UNITED STATES OF AMERICA, PLAINTIFF,	}	Action No. 1.
<i>against</i>		
THE NORTH AMERICAN COMMERCIAL Company, defendant.		

UNITED STATES OF AMERICA, *ss*:

*The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States of America, plaintiff, and The North American Commercial Company, defendant, a manifest error hath happened to the great damage of the said North American Commercial Company, as is said and appears by its petition and complaint, we, being

2 willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices and the judges of the United States circuit court of appeals for the second circuit to the court rooms of said court, in the post-office building in the city of New York, together with this writ, so that you have the same at the said place before the justices aforesaid on the 30th day of July, 1896; that the record and proceedings aforesaid being inspected, the said justices and judges of the said United States circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS,  
*Clerk of the Circuit Court of the United States  
for the Southern District of New York.*

The foregoing writ is hereby allowed.  
June 30, 1896.

E. H. LACOMBE,  
*U. S. Circuit Judge.*

(Indorsed:) U. S. circuit court of appeals, second circuit. United States of America against The North American Commercial Company. Action No. 1. Writ of error. Carter & Ledyard, attys. for defendant, 54 Wall street, N. Y. A copy of the within paper has been this day received at this office, Jul. 22, 1896. Wallace Macfarlane, U. S. attorney.

3 UNITED STATES OF AMERICA,  
*Southern district of New York, ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 369, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The North American Commercial Company, plaintiff in error, against The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twentieth day of October, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.]

JOHN A. SHIELDS, *Clerk*.

United States circuit court for the southern district of New York.

THE UNITED STATES OF AMERICA  
*against*  
THE NORTH AMERICAN COMMERCIAL COMPANY. }

*To the above-named defendant:*

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within  
4 twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, this 25th day of June, in the year one thousand eight hundred and ninety-four.

[L. S.]

JOHN A. SHIELDS, *Clerk*.

HENRY C. PLATT,  
*Plaintiff's Attorney,*  
*Office and Post-Office Address,*  
*Room 50, P. O. Bldg., New York City.*

Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA  
*vs.*  
THE NORTH AMERICAN COMMERCIAL COMPANY. }

The United States of America, plaintiffs in this action, by Henry C. Platt, their attorney for the southern district of New York, complain of The North American Commercial Company aforesaid, and on information and belief allege for a cause of action:

5 I. That the defendant above named is a corporation duly incorporated and organized under the laws of the State of California,

and was authorized and empowered by the laws pursuant to which it was organized and incorporated to make and enter into the written agreement hereinafter referred to.

II. That on or about the 12th day of March, 1890, the Secretary of the Treasury of the United States, on behalf of the United States, entered into a written agreement or writing obligatory pursuant to and in accordance with chapter 3 of title 23, Revised Statutes of the United States, with the above-named defendant, a copy of which written agreement or writing obligatory is hereto annexed and marked Exhibit A, and which is made a part of this complaint, wherein and whereby the said Secretary of the Treasury of the United States, in consideration of the covenants and agreements in said written agreement contained, leased to the said defendants, the said North American Commercial Company, for a term of twenty years from the first day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

III. That in consideration of such exclusive right to engage in the business of taking fur seals on said islands and in said Territory, and of the rights accruing under said written agreement to the said defendant, The North American Commercial Company, the defendant above named, covenanted and agreed, among other things, to pay to the Treasurer of the United States each year during the said term of twenty years an annual rental of the sum of sixty thousand dollars, and in addition thereto covenanted and agreed to pay the revenue tax or duty of two dol-

6      said islands, and also covenanted and agreed to pay to said Treasurer the further sum of seven dollars and sixty-two and one-half cents for each and every fur-seal skin taken and shipped from said islands.

IV. That it was further covenanted and agreed by said defendant in said written agreement that the said annual rental to become due the plaintiffs for the exercise of the said rights, privileges, and franchises, together with all other payments provided for in said written agreement, should be paid by said defendant on or before the first day of April of each year during the existence of said written agreement, beginning with the first day of April, 1891.

V. That the plaintiffs have well and truly performed and have kept, according to the tenor and effect and true meaning of the said written agreement, all conditions and covenants on their part to be done and performed.

VI. That after the making of said written agreement the defendant, the said North American Commercial Company, itself or by its agents lawfully authorized thereunto pursuant to said agreement entered upon said islands of St. George and St. Paul, and exercised and ever since has and now does exercise the exclusive right of engaging in the business of taking fur seals on said islands, and in fact took thereon a large number of fur seals.

VII. That during the year ending April first, eighteen hundred and ninety-four, the defendant took and shipped from said islands of St. George and St. Paul, under said indenture of lease, seven thousand five

hundred fur-seal skins, by reason whereof there became due and payable to the plaintiffs from said defendant, on the first day of April, eighteen hundred and ninety-four, the sum of sixty thousand dollars for the annual rental of the said exclusive right to engage in the business of taking fur-seal skins on said islands for the year ending on said date; the sum of fifteen thousand dollars for the revenue tax or duty of two dollars apiece laid on each of said seven thousand and five hundred seal skins; and the further sum of fifty-seven thousand one hundred and eighty-seven dollar', being, according to the covenant of said lease, the sum of seven dollars and sixty-two and one-half cents apiece for each of said fur-seal skins so taken and shipped, amounting in all to the total sum of one hundred and thirty-two thousand one hundred and eighty-seven dollars and fifty cents.

VIII. That said sum of \$132,187.50 is still in arrears and unpaid to the said plaintiffs, contrary to the tenor and effect, true intent and meaning of the said written agreement, and for the said covenants and agreements of the said defendants in that behalf, so made as aforesaid, and that the defendant, although often requested to do so before the commencement of this action, has not paid the said sum of \$132,187.50, or any part thereof, to the plaintiffs, but has wholly neglected and refused so to do, to the damage of the plaintiffs in the sum of \$132,187.50.

Wherefore the plaintiffs demand judgment against the said defendant in the sum of \$132,187.50, with interest thereon from the 1st day of April, 1894, besides costs of this action.

HENRY C. PLATT, *U. S. Atty.*

SOUTHERN DISTRICT OF NEW YORK,  
*City and County of New York, ss:*

Charles Duane Baker, being duly sworn, deposes and says that he is an assistant to the United States attorney for the southern district of New York; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. And deponent says that the sources of his information and the grounds of his belief are certain certified copies of the records in the Treasury Department and certain official letters and written statements relating to the matters alleged in said complaint, and which copies, letters, and statements are in the possession of deponent.

CHARLES DUANE BAKER.

Sworn to before me this 22d day of June, 1894.

GILBERT E. ROGERS,  
*Notary Public, Kings & N. Y. Counties.*

#### EXHIBIT A.

This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its

15879  
 president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890;

Witnesseth, that the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company, for a term of twenty years from the 1st day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

9 The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following—that is to say:

To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars; and in addition thereto agrees to pay the revenue tax, or duty, of two dollars, laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay to said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands; and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it, made from seals that may be taken on said islands during the said period of twenty years; and to secure the prompt payment of the sixty thousand dollars rental above referred to, the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

That it will furnish to the native inhabitants of said islands of St. George and St. Paul, annually, such quantity or number of dried salmon, and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine.

That it will also furnish to the said inhabitants eighty tons of coal annually, and a sufficient number of comfortable dwellings in  
 10 which said native inhabitants may reside; and will keep said dwellings in proper repair; and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers who shall be paid by the company a fair compensation; all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and will also provide a competent physician, or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessities of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.



The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

The said company further agrees to employ the native inhabitants of said islands to perform such labor, upon the islands, as they are fitted to perform, and to pay therefor a fair and just compensation such as may be fixed by the Secretary of the Treasury; and also agrees to contribute as far as in its power all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore  
 11 or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States; it also agrees to obey and abide by any restrictions or limitations upon the right to kill seals, that the Secretary of the Treasury shall judge necessary under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The said company further agrees that it will not permit any of its agents to keep, sell, give, or dispose of any distilled spirits or spirituous liquors, or opium, on either of said islands or the waters adjacent thereto, to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same, at any time, on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals, or concerning the islands of St. George and St. Paul, or the inhabitants thereof.

12 In witness whereof, the parties hereto have set their hands and seals the day and year above written.

(Signed)

WILLIAM WINDOM,  
*Secretary of the Treasury.*

NORTH AMERICAN COMMERCIAL COMPANY,

(Signed)

By I. LIEBES,  
*President of the North American Commercial Company.*

North American Commercial Company, incorporated  
 December, 1889.

Attest:

(Signed)

H. B. PARSONS,  
*Assistant Secretary.*



Endorsed: U. S. circuit court, southern district of New York. The United States versus The North American Commercial Company. Summons and complaint. Henry C. Platt, United States attorney, attorney for plaintiff. I hereby certify that on the 26th day of June, 1894, at the city of New York, in my district, I personally served the within summons and complaint upon the within named The North American Commercial Company, by exhibiting to Darius O. Mills, vice-president of said company, the within originals and at the same time leaving with him a copy of each thereof. J. W. Jacobus, United States marshal, southern district of New York. Dated June 29, 1894. U. S. circuit court, filed June 29, 1894. John A. Shields, clerk.

13 Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA  
*against*  
 THE NORTH AMERICAN COMMERCIAL COMPANY. }

The North American Commercial Company, the defendant in this action, by Carter & Ledyard, its attorneys, answers upon information and belief the complaint of the United States, the plaintiffs therein, as follows:

#### FIRST DEFENSE.

First. This defendant admits that it is a corporation organized, existing, authorized, and empowered as alleged in the first subdivision of the complaint.

Second. This defendant admits the execution, in March, 1890, of a written agreement between the United States and this defendant, such as is alleged in the second subdivision of said complaint, but as to the precise contents thereof it begs to refer to the original of the same, to be produced upon the trial of this action.

Third. This defendant denies that by the written agreement aforesaid, or otherwise, it, the said defendant, covenanted or agreed, as in the third paragraph or subdivision of said complaint is alleged, but says that the said agreement was made in pursuance of section 1963 of the Revised

Statutes, and of the other sections and provisions of law relating  
 14 to and regulating the leasing by the United States of the right to take seals on the islands of St. George and St. Paul, in the Territory of Alaska, and that by the true construction thereof such right meant and was intended as the right to take one hundred thousand seals per annum, subject, however, to the exercise by the Secretary of the Treasury of a discretionary power to limit and reduce the number to be taken, with a proper proportionate reduction of the rents agreed to be paid, in case it became necessary for the preservation of the stock of seals on said islands to make such reduction; and that the said company did not covenant or agree to pay the said sum of sixty thousand dollars or the said additional sum of seven dollars sixty-two and one-half cents in case the said Secretary exercised his discretionary power to limit or reduce the right of killing to a number less than one hundred thousand;

nor did the said company agree or covenant to pay any sum whatever to the United States, either by way of rental or otherwise, except upon the condition that it was permitted by the United States to enjoy and exercise the right to take seals on the said islands.

Fourth. This defendant, further answering, admits that it was covenanted and agreed by said agreement that the annual rental aforesaid and all other payments to be made by this defendant under said written agreement, should be paid by this defendant on or before the first day of April in each year, during the term mentioned in said written agreement, beginning with the first day of April, 1891, as alleged in the fourth subdivision of said complaint.

Fifth. This defendant, further answering, denies that the plaintiffs have well and truly performed and kept all the conditions and covenants on their part to be done and performed in and by said written agreement.

Sixth. This defendant admits that after the making of said  
15 written agreement, it did, by itself or its agents lawfully authorized thereunto, enter upon the said islands of St. George and St. Paul, but it denies that it has ever since exercised the exclusive right of engaging in the business of taking fur seals on said islands, because it was and has, during a large part of the time since the execution of said agreement, been prohibited and prevented by the United States from engaging in the business of taking fur seals on the said islands.

Seventh. This defendant, further answering, denies that during the year ending April 1, 1894, it took or shipped from said islands of St. George and St. Paul, under said indenture of lease, seventy-five hundred fur-seal skins or any fur-seal skins whatever, and it denies that there has become due or payable to the plaintiffs from this defendant on the first day of April, 1894, or at all, the said sum of sixty thousand dollars, or any sum whatever, for the rent under the said lease, or the said further sum of fifty-seven thousand one hundred and eighty-seven dollars, or any sum whatever, for any seals taken by it under said agreement and shipped. And denies that it is indebted to the United States in the sum of fifteen thousand dollars, or in any sum whatever, for the revenue tax or duty of two dollars apiece for each of the seventy-five hundred seal skins turned over to it by the United States upon said islands in the year ending April 1, 1894, the same not having been taken by said company under said agreement.

Eighth. This defendant, further answering, denies that the sum of one hundred and thirty-two thousand one hundred and eighty-seven  $\frac{50}{100}$  dollars, or any other sum, is in arrears or unpaid and due to the plaintiffs under the said written agreement or otherwise. And this defendant denies that by reason of the matters alleged in the said complaint the said plaintiffs  
16 have been damaged in the said sum of one hundred and thirty-two thousand one hundred and eighty-seven  $\frac{50}{100}$  dollars, or any sum whatever.

#### SECOND DEFENSE.

Ninth. And this defendant, for a second and separate answer and defense to said complaint, and for a counterclaim against the said plaintiffs, alleges

that on or about the 12th day of March, 1890, and in pursuance of section 1963 of the Revised Statutes, an agreement in writing, of which "Exhibit A," annexed to the said complaint, is substantially a copy, was executed by and between the Secretary of the Treasury of the United States on behalf of the United States and this defendant, and that the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, thereby granted to this defendant, was intended by and between the parties to said agreement to be a right on the part of this defendant to take for their skins sixty thousand fur seals on the said islands of St. George and St. Paul during the year ending May 1, 1891, and one hundred thousand fur seals on said islands during each and every other year during the continuance of said agreement, subject, however, to the authority of the said Secretary of the Treasury to limit the right of this defendant, in case such limitation should become necessary for the preservation of the herd of seals resorting to the said islands, to such smaller number as the said Secretary might deem necessary, and in case of any such reduction a proportionate reduction of all the rents reserved or payable to the United States, such as should be right and proper, was to be made.

Tenth. And this defendant further says that at no time did the said Secretary of the Treasury limit or restrict the right of the defendant to kill or take seals under the said agreement for, during, or in respect of the year ending April 1, 1894, but this defendant says that prior 17 to the first day of April, 1893, the United States had entered into an obligation by treaty with the Government of Great Britain, whereby it engaged and bound itself not to permit any taking of seals for their skins upon the said islands of St. George and St. Paul, either under the agreement or otherwise, and that afterwards, and in pursuance of the said obligation and in order to perform the same, on or about the first day of April, 1893, the United States ordered and directed this defendant not to take, and prohibited this defendant from taking, on the said islands of St. George and St. Paul, or either of them, any fur seals for their skins at any time during the year ending April 1, 1894, and that this defendant, by reason of said order and prohibition, did not and could not take during the year last aforesaid any fur seals for their skins. And this defendant alleges that the order and prohibition aforesaid was not necessary for the preservation of the seals upon said islands, nor was it at any time considered or determined by said Secretary of the Treasury that any limitation or restriction of the right of the defendant under said agreement to take fur seals for their skins on said islands for or in respect of the year ending April 1, 1894, was necessary for the preservation of said seals.

And this defendant alleges that the United States in making the order and direction aforesaid, and in preventing this defendant from taking any fur seals under the said agreement, violated said agreement upon its part and subjected this defendant to great loss and damage; and this defendant says, upon information and belief, that but for the order and prohibition of the United States aforesaid, it could and would have taken, during the year last aforesaid, under said agreement, thirty thousand fur seals for their skins, and would have made thereon, and received

therefrom, a large profit, to wit, the sum of at least two hundred and eighty-three thousand seven hundred and twenty-five dollars.

18 Eleventh. And this defendant further says that during the year last aforesaid there were killed by the natives inhabiting the islands aforesaid, for food, and under the assumed authority of the Secretary of the Treasury of the United States, and without the consent of the defendants, seventy-five hundred seals, and that the skins of the same were, by the authority of the United States, turned over to and were received by this defendant, upon payment by the defendant to the plaintiffs of the sum of thirty-seven hundred and fifty dollars, and that on or about April 1, 1894, the defendant offered to pay and tendered to the plaintiffs the further sum of twenty-three thousand seven hundred and eighty-nine  $\frac{50}{100}$  dollars on account of said skins, said last-mentioned sum being the full amount which would have been due to the plaintiffs from the defendant had said seals been taken by it under its lease, which the plaintiffs refused to accept; but this defendant says that as against any sum or sums due to the United States in respect to the said seventy-five hundred seal skins, whether by way of revenue tax or duty, or otherwise, it has a just, legal, and equitable demand against the United States by reason of the breach of contract on the part of the United States, committed as aforesaid, and to the amount aforesaid of two hundred and eighty-three thousand seven hundred and twenty-five dollars, which should be allowed to the said defendant by way of set-off or counterclaim against any sum found to be due to the United States in this action.

And said defendant further says that heretofore and on or about the day of May, 1894, it duly presented to the accounting officers of the Treasury, for their examination, its demand aforesaid against the United States, and that the same has been, by said accounting officers, disallowed, and that no part thereof has been paid, to the damage of this defendant in the said sum of two hundred and eighty-three  
19 thousand seven hundred and twenty-five dollars, with interest thereon from the 1st day of June, 1894.

Wherefore, the said defendant demands judgment dismissing said complaint, with costs, and for said sum of two hundred and eighty-three thousand seven hundred and twenty-five dollars, with interest thereon from the 1st day of June, 1894, and costs.

CARTER & LEDYARD,  
*Attorneys for Defendant, 54 Wall St., New York.*

N. L. JEFFRIES, Esq., *of Counsel.*

UNITED STATES OF AMERICA,  
*Southern district of New York, ss:*

James C. Carter, being duly sworn, says: That he is one of the attorneys of the North American Commercial Company, the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to the matters in said answer not stated upon his own knowledge are statements made to him by other counsel of the said defendant and papers in his posses-

sion, and that the reason why this affidavit of verification is not made by said defendant is that it is a foreign corporation.

JAMES C. CARTER.

Sworn to before me this 21st day of December, 1894.

[L. S.]

C. H. SHERRILL, Jr.,  
Notary Public, New York County.

(Endorsed:) U. S. circuit court, southern dist. of New York. The United States of America against The North American Commercial Company. Amended answer. Carter & Ledyard, attorneys for defendant, 54 Wall street, N. Y. Due service of a copy of the within is admitted this 22 day of Dec., 1894. W. Macfarlane, U. S. atty., atty. for plffs. U. S. circuit court. Filed Dec. 22, 1894. John A. Shields, clerk.

United States circuit court, southern district of New York.

THE UNITED STATES

vs.

THE NORTH AMERICAN COMMERCIAL COMPANY. }

The United States, by Wallace Macfarlane, United States attorney for said district, replying to the counterclaim contained in the amended answer of the defendant above named:

1. Admit the making of the agreement in writing referred to in the ninth paragraph of said answer and forming part of the alleged second defense therein.

2. And plaintiffs, further replying, deny that it was agreed or intended to be agreed by said written agreement that in case of any reduction by the Secretary of the Treasury of the number of seals that might be taken in any year a proportionate reduction of the rents reserved or payable to the United States should be made.

3. And plaintiffs, further replying, deny each and every allegation not herein expressly admitted in said answer contained respecting said counterclaim.

WALLACE MACFARLANE,  
United States Attorney.

21 SOUTHERN DISTRICT OF NEW YORK, ss:

Charles Duane Baker, being duly sworn, deposes and says that he is an assistant to the United States attorney for the southern district of New York; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; and deponent says that the sources of his information and the grounds of his belief are certain certified copies of the records in the Treasury Department and certain official letters and written statements relating to the matters alleged in said answer, and which copies, letters, and statements are in the possession of deponent.

CHARLES DUANE BAKER.

Sworn to before me this 21st day of January, 1895.

JOHN A. SHIELDS,  
U. S. Commissioner.

(Endorsed:) U. S. circuit court, southern district of New York. United States versus North American Commercial Co. Reply to counterclaim. Wallace Macfarlane, United States attorney, attorney for plaintiff. To Messrs. Carter & Ledyard, attorneys for defendant. Due service of a copy of the within is hereby admitted. New York, January 21, 1895. Carter & Ledyard, attorneys for defendant.

22 United States circuit court, southern district of New York.

THE UNITED STATES  
*vs.*  
 THE NORTH AMERICAN COMMERCIAL COMPANY. }

It is hereby stipulated between the parties to this action that a jury be waived, in accordance with the provisions of sections 649 and 700 of the Revised Statutes.

Dated January 16, 1896.

WALLACE MACFARLANE,  
*U. S. Atty., So. Dist. of N. Y.*  
 CARTER & LEDYARD,  
*Attys. for Deft.*

(Endorsed:) United States circuit court. United States vs. The North American Commercial Co. Waiver of jury. U. S. circuit court. Filed Jan. 15, 1896. John A. Shields, clerk.

23 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Wednesday, the fifteenth day of January, in the year of our Lord one thousand eight hundred and ninety-six.  
 Present—The Honorable William J. Wallace, circuit judge.

THE UNITED STATES  
*vs.*  
 THE NORTH AMERICAN COMMERCIAL COMPANY. }

Now comes the plaintiff by Wallace Macfarlane, United States attorney, and moves the trial of this cause.

Likewise comes the defendant by James C. Carter, esq., its attorney. Thereupon a jury is waived and the cause proceeds to trial.

After hearing the evidence for the respective parties and the argument of counsel.

C. A. V.

(An extract from the minutes.)

[L. s.]

JOHN A. SHIELDS, *Clerk.*

24 U. S. circuit court, southern district of New York.

THE UNITED STATES OF AMERICA  
*agst.*  
 THE NORTH AMERICAN COMMERCIAL COMPANY. }

WALLACE, *Circuit Judge:*

This is an action to recover rent for the year 1893 accruing under a lease executed March 12, 1890. By that instrument the plaintiffs by the



then Secretary of the Treasury leased to the defendant for twenty years, from the first day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins, and the defendant agreed to pay as annual rental the sum of \$60,000, and \$7.62½ for each fur skin taken and shipped, together with a revenue tax of \$2 upon each skin, payment to be made on or before the first day of April of each and every year during the existence of the lease. The lease contained the following covenants on the part of the defendant: "It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals the Secretary of the Treasury shall judge to be necessary under the law for the preservation of the seal fisheries in the United States, and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year, a greater number of seals than is authorized by the Secretary of the Treasury. It is understood and agreed that the number of fur seals to be taken and killed for  
25 their skins on said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed 60,000."

The plaintiffs allege that the defendant, pursuant to the lease, took and shipped 7,500 fur-seal skins from said islands during the year 1893, whereby there became due by its terms, beside the \$60,000, the sum of \$72,187 50, in all the sum of \$132,187, which was payable April 1, 1894, and has not been paid. The defendant denies that during that year it took any seals from said islands or shipped any skins whatever under the lease. It alleges that the Secretary of the Treasury did not limit or restrict the right of the defendant to take seals under the agreement during 1893, pursuant to the authority conferred on him by law to do so to the extent necessary for the preservation of the herd; that prior to the first day of April, 1893, the United States entered into an obligation by treaty with the Government of Great Britain whereby they engaged not to permit any taking of seals for their skins upon the said islands, and in order to perform the same prohibited this defendant from taking any seals for their skins at any time during that year; that by reason thereof the defendant could not during that year take any fur seals for their skins; that the prohibition was not necessary for the preservation of the seals upon said islands; that by preventing the defendant from taking any skins under the agreement the plaintiffs violated their agreement and subjected the defendant to loss in the sum of at least \$283,725; and that prior to the beginning of the suit defendant duly presented to the accounting officers of the Treasury for their examination its demand aforesaid, and that the same has been by said accounting officers disallowed.

The decision of the case requires a determination of the nature and extent of the rights and obligations of the parties under the lease, and whether upon the facts there has been an invasion by the plaintiffs of the contract rights of the defendant whereby it has been deprived  
26 of the privileges to which it was entitled. The terms of the covenant which qualifies the exclusive right demised to the defendant of engaging in the business of taking fur seals on the islands are very comprehensive; and the present controversy is the outgrowth

of a difference of opinion between the parties respecting its scope and effect. What was intended to be included in the general right granted to the defendant is manifest. It was not the exclusive right of killing the seals upon the islands, or of killing any specified number of seals; but of engaging in what at the time was known as a business, a definite pursuit which had been regulated by law and official supervision. By the acquisition of Alaska, in 1868, the United States became the proprietor of the seal fisheries appurtenant to the islands of St. George and St. Paul. Those islands are the breeding ground of the herd which in the early spring moves northward to Behring Sea, and are the habitat of the herd during the summer and fall. The seals land in great numbers upon the islands, dividing into families consisting of a male or bull, and many females or cows. The younger seals, or bachelors, are not admitted to the breeding ground, but are driven off and destroyed in great numbers by the bulls; and until they are three or four years old occupy other portions of the islands, passing through lanes out to and in from the sea at intervals. They multiply in such excess of the breeding requirements that a large proportion of them can be killed without diminishing the birth rate of the herd, and their skins are exceedingly valuable. By protecting the females and restricting capture to the bachelors the fisheries are capable of a permanent and annual supply of skins, affording a valuable source of revenue. The subject soon attracted the attention of Congress, and by the act of July 1, 1870, a code of regulations was adopted designed to protect the fisheries, and secure a revenue to the Government therefrom. This act made it unlawful to kill seals upon the islands or adjacent

27 waters, except during certain specified months, or to kill any female seals; regulated the manner in which the natives of the islands might be permitted by the Secretary of the Treasury to kill young seals for food and old ones for clothes; and prescribed penalties and forfeitures for violation of its provisions. The act also authorized the Secretary of the Treasury to lease to proper and responsible parties, having due regard to the interests of the Government, the native inhabitants, and the protection of the seal fisheries, for a term of twenty years, the right to engage in the business of taking fur seals on the islands, at an annual rental of not less than \$50,000, and at the expiration of said term or the surrender or forfeiture of any lease to make other similar leases. He was required in making leases to have due regard to the preservation of the seal-fur trade of the islands, and to exact from lessees an obligation "conditioned for the faithful observance of all laws and requirements of Congress, and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals and disposing of the same." The act also contained the following provision: "Sec. 3. And be it further enacted, that for the period of twenty years from and after the passing of this act the number of fur seals which may be killed for their skins upon the island of St. Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is hereby limited and restricted to twenty-five thousand per annum. Provided, that the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals,



with such proportionate reduction of the rents reserved to the Government as shall be right and proper, and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for the violation of the provisions of the first and second sections of this act."

Pursuant to this enactment, and in 1870, a lease was made by the Secretary of the Treasury for the term of twenty years to the Alaska Commercial Company. That lessee, during the whole term of its lease, was allowed to take annually the full quota of one hundred thousand skins, but during one year contented itself with taking only seventy-five thousand.

In the revision by Congress, in 1874, of the laws of the United States, the lease to the Alaska Commercial Company was specifically recognized, and the provisions of the act of July 1, 1870, were substantially reproduced. The revisers treated the act of 1870 as conferring authority upon the Secretary of the Treasury, after the expiration of the first period of twenty years, to prescribe the conditions of leases, except in respect to the length of term and the minimum rental, and they treated the provision in that act fixing the maximum take, and requiring a proportionate reduction of rent in case the Secretary of the Treasury should reduce it, as applicable only to the twenty-year period ending July 1, 1890; and this would seem the natural and reasonable construction of that act. Whether that construction was correct or not the revision was the legislative declaration of the statute law upon the subject on and after the first day of December, 1873, and in the absence of any obscurity in the meaning the court cannot look to the preexisting statutes to see whether or not they were correctly incorporated in the revision. (*U. S. v. Bowen*, 100 U. S., 508.) By act of March 24, 1874, Congress amended the original act so as to authorize the Secretary of the Treasury to "designate" the months in which fur seals may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island, respectively."

The effect of this act was to abrogate the provisions of the pre-existing law by which, for a period of twenty years, no more than 75,000 seals could be killed on the island of St. Paul and 25,000 on the island of St. George, and to confer upon the Secretary of the Treasury full discretion in the matter. Its manifest intent was to permit him to authorize more or less to be killed during that period as well as thereafter. It repealed by implication so much of the Revised Statutes as was inconsistent with it, because it took effect as a subsequent statute, although later in point of time. (*Rev. Stat.*, 5601.)

Passed as it was by the same Congress which in the Revised Statutes had recognized the existing lease to the Alaska Commercial Company, it must be presumed that the act of March 24, 1874, had that lease in contemplation and was not intended to impair the vested rights of the lessee. Consequently it should be read as intended to remove the limitation upon the number of seals which might be taken by that lessee, relegate the designation of the number to the discretion of the Secretary of the Treasury, but entitle the lessee to a proportionate reduction of rent in case the Secretary at any time during the twenty-year term should des-

ignate a less number than the original maximum; and after the expiration of that period to leave it wholly to the Secretary of the Treasury in the exercise of his discretion to determine what number a lessee should be permitted to take.

The present lease must be read in the light of the existing situation when it was made and as controlled by the laws relating to and authorizing it; and, as thus read, its meaning and the intention of the parties seem so clear that any reference to the preliminary proposal and bid is unnecessary. It was intended to secure to the defendant the exclusive right of taking the annual product of the fisheries, subject to the regulations prescribed by the statutes, and subject also to such further restrictions and limitations as the Secretary of the Treasury, in the  
30 exercise of his discretion, should deem necessary for the preservation of the fisheries. When restricted by the Secretary of the Treasury the defendant was not to be entitled to kill a greater number of seals than authorized by him. In the absence of such restrictions its privileges were coextensive with those of the previous lessee.

It is not unusual for a contractor with the Government, as with other municipal bodies, to repose upon the good faith and discretion of some public officer who represents the Government and is responsible for the protection of its interests in the transaction. Such contractors frequently consent to stipulations by which the value of the contract is substantially controlled by the judgment of such an officer. In such contracts, however, it is implied that the public officer will not act arbitrarily or capriciously, but will exercise an honest judgment. *Chapman v. Lowell* (4 Cush., 378); *Kihlberg v. U. S.* (97 U. S., 398); *Bowery Nat. Bank v. The Mayor* (63 N. Y., 336). The party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated, and can not be bound by the substituted judgment of another authority. The defendant was willing to assume, as it was justified in doing, that a Secretary of the Treasury of the United States would not abuse the power with which the contract entrusted him. And if, by any legitimate exercise of that power, it has been disappointed in the fruits of the contract, it would have had no just reason to complain.

The contention for the defendant that the Secretary of the Treasury did not limit or restrict its right to take seals under the lease for the year 1893, but that it was prohibited by the Government of the United States from exercising the right, and was thus deprived of the benefit of its contract, rests on the effect of the convention between the Governments of the United States and Great Britain known as the *modus vivendi*. By  
31 that convention the United States promised, during the pendency of the arbitration between the two Governments relating to the Behring Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the islands in question "in excess of 7,500 to be taken on the islands for the subsistence of the natives," and to use promptly its best efforts to insure the enforcement of the prohibition. The events which led to the convention are matters of public history and need not be recited. Undeniably the preservation of the seal fisheries upon the islands was one of the objects which influenced it. But its adoption was not necessary for their preservation except in the sense that the fisheries were likely to be destroyed by pelagic seal-

ing, and without the *modus vivendi* pelagic sealing could only be suppressed by force and at the risk of war. It was adopted for the purpose of avoiding irritating differences and to promote a friendly settlement between the two Governments touching their rights in Behring Sea. There never was a time in the history of the seal fisheries when it was necessary or even desirable to limit the killing upon the islands to the number specified in the *modus vivendi*. As has been stated, the killing was always confined to the bachelor seals, and when thus confined did not cause any diminution in the annual product of the herd. The destruction of the herd was caused by the killing of the females on the high seas, while on their migration southward, by the pelagic sealers. The killing of 100,000 annually by the previous lessee did not perceptibly affect the supply, and it was not until 1890, when the inroads of the pelagic sealers began to threaten the ultimate extirpation of the herd, that it was materially affected.

By the adoption of the *modus vivendi* and its enforcement by the Government during the years 1891, 1892, and 1893, a situation was created which was not within the contemplation of the parties to the lease.

It seems to have been supposed by both parties when the lease was made that after the first year of the term, during which the defendant was to be limited to a take of 60,000 seals, the normal quota of 100,000 could probably be killed. Because this was the understanding the Secretary of the Treasury who was in office until March 4, 1893, acting upon the advice of the then Attorney-General, consented to accept of the defendant a reduced rental during the period of the *modus vivendi* in lieu of the rental fixed by the lease. Besides the rental the defendant, by the terms of its contract, assumed quite onerous obligations. It agreed to supply the inhabitants of the island with coal, provide them with comfortable dwellings, establish and maintain schoolhouses and a house for religious worship, provide them with competent physicians and necessary medicines, and also to provide the necessaries of life for the widows and orphans and aged and infirm inhabitants, all at its own expense. It would be preposterous to suppose that the defendant or any other lessee would have assumed the obligations of the contract had it been understood that the privilege leased was to be of such comparatively insignificant value as it proved. By the enforcement of the *modus vivendi* the defendant was prohibited from killing any seals. As appears by the diplomatic correspondence, the clause authorizing the killing of 7,500 seals upon the islands "for the subsistence of the natives" was inserted for the benefit of the defendant as well as the natives, with the purpose and expectation that while the latter should have the meat the defendant should have the skins as a *pro tanto* satisfaction of its contract rights. There is no evidence, however, that the defendant consented to or was consulted about that provision of the convention.

That the enforcement of the prohibition was a breach of the contract by the Government does not seem to admit of doubt. It was an invasion of the privilege in the nature of an eviction. Notwithstanding the defendant was permitted, *ex gratia*, to receive some benefits from its contract, its privilege during the period of the *modus vivendi* was suspended and practically annulled. When the Government

enters into a contract with an individual or corporation it divests itself of its sovereign character, so far as concerns the particular transaction, and takes that of an ordinary citizen, and it has no immunity which permits it to recede from the fulfillment of its obligation. As was said in *Cooke v. The United States* (91 U. S., 398): "If it comes down from its position of sovereignty and enters the domain of commerce it submits itself to the same laws that govern individuals there."

It will not do to say that the situation when the *modus vivendi* was entered into was such as would have justified the Secretary of the Treasury in limiting the quota to 7,500, and consequently that the defendant was not deprived of any substantial part of its contract. The assumption would not be true as a matter of fact, for the evidence is that 20,000 bachelors and probably more could have been killed upon the islands during 1893. Moreover, the defendant did not agree that the judgment of the Government might be substituted for that of the Secretary of the Treasury in determining what number it might be permitted to take, and to compel it to accept the substituted judgment would deprive it of the only guaranty contained in its contract for just and reasonable treatment. By the convention the Secretary of the Treasury was shorn of all power and discretion in the matter. He did not assume or attempt to fix the quota for 1893. All the seals taken upon the islands during that year were taken by the Government itself through the agents of the Treasury Department, but the defendant was permitted to cooperate in selecting the seals to be killed, and to take and retain the skins, apparently pursuant to an understanding with the Secretary of the Treasury. In this way, and in this way only, the defendant received 7,500 skins.

34 The defendant, having accepted a partial performance of the contract, must make a commensurate compensation to the plaintiffs. It might have refused to accept the skins, and in that case could have successfully resisted any claims for rental, but having accepted some of the fruits of the contract it cannot retain them without making a just remuneration. *Tomlinson v. Day* (2 Brod. & Bing., 680); *Smith v. Raleigh* (3 Camp., 513); *The Fitchburg Citton Manufactory Cor. v. Melven* (15 Mass., 268); *Lawrence v. French* (25 Wend., 443); *McClurg v. Price* (59 Pa. St., 420); *Day v. Watson* (8 Mich., 536); *Watts v. Coffin* (11 Johns. R., 499); *Lewis v. Payn* (4 Wend., 423). It is quite impracticable, if not impossible, to determine the amount for which the defendant should respond except by ascertaining the value of its privileges during the year in question and adjusting the value of the partial benefit proportionately to that of the whole benefit it would have derived if it had been permitted to fully enjoy the privilege.

As has been stated, the evidence is that if the defendant had been allowed to exercise its right to take the seals in the customary way it could have obtained 20,000 skins. This number is less than the estimate of the experts, but the accuracy of their conclusions is somewhat impaired by the fact that a smaller quota was assigned to the defendant in 1894, after the termination of the *modus vivendi*. If it had taken 20,000 skins there would have been due to the Government, besides the \$60,000 rental, a per capita payment of \$192,500; in all the sum of \$252,500. Upon this basis the contract value per skin would have been \$12.62½, and for the 7,500 skins \$94,687.50.

According to the evidence, the defendant could have realized, at the average market prices for 1893, the sum of \$24 for each skin, a total for the 12,500 which it was prevented from taking by the act of the Government of \$300,000, and the capture and marketing of the whole number would not have entailed upon the defendant any additional expense. There would have been payable, however, under the contract the further sum, at the basis of \$12.62½ per skin, of \$157,812.50. Thus the defendants sustained a net loss in consequence of the breach of its contract in the sum of \$142,187.50, for which it has a just claim against the Government.

Notwithstanding the defendant's claim is one for unliquidated damages, it would seem to be a proper matter of counterclaim or credit were it not for the fact that the conditions prescribed by section 951 of the United States Revised Statutes have not been complied with by the defendant. (*Gratiot v. U. S.*, 15 Peters, 338; *U. S. v. Wilkins*, 6 Wheat., 135; *U. S. v. Eckford*, 6 Wallace, 484; *U. S. v. Ringgold*, 8 Peters, 150.) That section, which originated in the act of March 3, 1797, has received a very liberal construction by the Supreme Court, "extending it to matters even distinct from the cause of action if only such as the defendant is entitled to a credit on, whether equitable or legal." (*U. S. v. Buchanan*, 8 How., 105.) By that section, however, no claim for a credit shall be admitted in suits brought by the United States against individuals except such as appear to have been presented to and disallowed in whole or in part by the accounting officers of the Treasury, unless it is proved that the defendant is in possession of vouchers not before in his power to procure and was prevented from exhibiting his claim for such credit at the Treasury by absence from the United States or by some unavoidable accident. It has not been shown that the claim has been presented to the accounting officers of the Treasury, nor that the defendant has been prevented by any cause from making presentation. Consequently the defendant must seek its remedy by a suit against the Government brought conformably to the provisions of the act of March 3, 1887. (*Supp. Rev. Statutes*, vol. 1, p. 559.)

36 It follows that the plaintiff is entitled to judgment in the sum of \$94,687.50.

For the United States: Wallace Macfarlane, U. S. Atty; Max J. Kohler, Asst. U. S. Atty.

For the defendant: James C. Carter, George H. Balkam, N. L. Jeffries.

(Endorsed:) U. S. Cir. Ct., S. D. of N. Y. The United States of America agst. The North American Com. Co. Wallace, Cir. Judge. U. S. Circuit Court. Filed Apr. 27, 1896. John A. Shields, clerk.

UNITED STATES OF AMERICA

vs.

THE NORTH AMERICAN COMMERCIAL COMPANY.

WALLACE, *Circuit Judge*:

In ruling that the defendant could not be allowed for its counterclaim in this action because its claim for damages had not been presented to and disallowed by the accounting officers of the Treasury the fact was overlooked that the act of Congress of March 30, 1868 (sec. 191 of the Revised Statutes), was repealed by the act of July 31, 1894. Under

section 191 of the United States Revised Statutes, as construed by the Supreme Court in *United States vs. Harmon* (147 U. S., 268-275), the decision of the Comptroller of the Treasury was final and conclusive so far as the Executive Department was concerned, and that officer, and not

37 the Secretary of the Treasury, was the accounting officer to whom the claim should have been presented and by whom it should have been disallowed to authorize the credit to be admitted upon the trial under section 951. The repeal of section 191, had it not been for the supplementary legislation of Congress, would have left the laws as they stood prior to the act of March 30, 1868, and the action of the Secretary of the Treasury, as the head of a department, in rejecting the claim would have rendered it unnecessary for the defendant to take any further steps in respect to its presentment. But the act of July 31, 1894, provides that the Auditor for the Treasury Department shall receive and examine all accounts relating to \* \* \* the Alaskan fur-seal fisheries and certify the balances arising therefrom to the division of book-keeper and warrants, and also provides that the balances so certified upon the settlement of public accounts shall be final and conclusive upon the executive branch of the Government. In view of this statute I am constrained to hold that the presentation of the account in 1865 to the Secretary of the Treasury was not sufficient.

(Endorsed:) U. S. of America vs. The No. Amer. Com. Co. Wallace, C. J. U. S. circuit court. Filed Jun. 10, 1896. John A. Shields, clerk.

38 United States circuit court, southern district of New York.

UNITED STATES OF AMERICA	}	Action No. 1.
<i>against</i>		
THE NORTH AMERICAN COMMERCIAL COMPANY.		

The parties in the above entitled action having by stipulation in writing entered into by their respective attorneys of record and dated and filed with the clerk of this court on the fifteenth day of January, 1896, before the trial of this action, provided that the issues of fact therein be tried and determined by the court without the intervention of a jury under sections 649 and 700 of the Revised Statutes of the United States, and the trial of the said action having taken place before me, beginning January 15, 1896, I do decide and find as follows:

#### FINDINGS OF FACT.

First. That at the time of the making of the lease by the United States of America, the plaintiff in this action, to the North American Commercial Company, the defendant therein, dated March 12, 1890, hereinafter mentioned, the said defendant was, ever since has been, and now is a corporation duly created and existing under and by virtue of the laws of the State of California.

Second. That on or about the 12th day of March, 1890, the said plaintiff and the said defendant made and entered into a certain indenture or lease, dated that day, a copy of which is annexed to the complaint in the said action and marked Exhibit A.

39 Third. That the following is a copy of the said lease :

"This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of



the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890, witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company, for a term of twenty years from the first day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

"The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following—that is to say:

"To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands; and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it, made from seals that may be taken on said islands during the said period of twenty years; and to secure the prompt payment of the sixty thousand dollars rental above referred to, the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon, when due, to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

40 "That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually, such quantity or number of dried salmon, and such quantity of salt, and such number of salt barrels for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine.

"That it will also furnish to the said inhabitants eighty tons of coal annually, and a sufficient number of comfortable dwellings, in which said native inhabitants may reside, and will keep said dwellings in proper repair; and will also provide and keep in repair such suitable school-houses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children of said islands, the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and will also provide a competent physician or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessities of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves, all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

"The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

"The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to perform, and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

"The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore, or may hereafter, establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possessions of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall judge necessary under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year, a greater number of seals than is authorized by the Secretary of the Treasury.

"The said company further agrees that it will not permit any of its agents to keep, sell, give, or dispose of any distilled spirits or spirituous liquors, or opium, on either of said islands or the waters adjacent thereto, to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

"It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

"The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same, at any time, on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals, or concerning the islands of St. George and St. Paul, or the inhabitants thereof.

"In witness whereof the parties hereto have set their hands and seals the day and year above written.

(Signed)

"WILLIAM WINDOM,  
"Secretary of the Treasury.

"NORTH AMERICAN COMMERCIAL COMPANY,

(Signed)

"By I. LIEBES,  
"President of the North American Commercial Company.

"North American Commercial Company, incorporated December, 1889.

"Attest:

(Signed)

"H. B. PARSONS,  
"Assistant Secretary."



42 Fourth. That pursuant to the provisions of an act of Congress passed July 1, 1870, and on or about the third day of August, 1870, said plaintiff leased to the Alaska Commercial Company for the term of twenty years from the first day of May, 1870, the right to engage in the business of taking fur seals on the said islands and to send a vessel or vessels to said islands for the skins of such seals upon the terms and conditions therein set forth.

Fifth. That the said Alaska Commercial Company, during the whole term of its lease, was allowed to take annually the full quota of 100,000 fur-seal skins; but that during one year of its lease it took only 75,000 for the reason that it could not have sold in the market a larger number at a greater profit.

Sixth. The said islands of St. George and St. Paul in the Territory of Alaska are the breeding ground of the herd of seals which in the early spring moves northward to Behring Sea, and are the habitat of that herd during the summer and fall of each year; that the seals land in great numbers upon the said islands and divide into families, each consisting of one male or bull and many females or cows; that the young or male seals, or bachelors as they are called, are not admitted to the breeding ground, but are driven off by the older males and oftentimes destroyed by them; that until such bachelor seals arrive at the age of three or four years they occupy other portions of the islands and can be driven away from the breeding ground and killed without disturbing the seals on the breeding grounds; that a large proportion of these young bachelor seals may be so killed without diminishing the birth rate of the herd, and their skins are a valuable article of commerce and are more valuable than the skins of the females or older males; that by protecting the females and restricting the capture to the bachelors the fisheries are capable of a permanent and annual supply of skins which would afford a valuable source of revenue.

43 Seventh. That after the making of the said lease by the said plaintiff and the said defendant, the said defendant entered upon the enjoyment of the right thereby granted it; but on account of the enforcement by the said plaintiff of the provisions of a convention or agreement made and entered into by the said plaintiff with the Government of Great Britain it prohibited and prevented the said defendant, during the years 1890, 1891, and 1892 from taking on the said islands as many seals as might have been taken without diminution of the herd, and far less in each year than the number mentioned in the said lease for the first year; the numbers taken in those years being in 1890, 20,995; in 1891, 13,482; and in 1892, 7,547.

Eighth. That for the said years of 1890, 1891, and 1892, it was agreed between the Secretary of the Treasury and the said defendant that the said defendant should pay to the said plaintiff for the seal skins taken by it on the said islands the tax and such proportionate part of the rental of \$60,000 and the per capita sum of seven dollars sixty-two and one-half cents, as the number of seals taken bore to one hundred thousand, except that for 1890 the per capita of seven dollars sixty-two and one-half cents was not so reduced.

Ninth. That by a convention or agreement with the Government of Great Britain, commonly called the *modus vivendi*, the United States

promised, during the pendency of the arbitration between those two governments relating to the Behring Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the said islands in excess of 7,500 to be taken from the islands for the subsistence of the natives, and to use promptly its best efforts to insure the enforcement of the prohibition.

44 Tenth. That pursuant to such agreement the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.

Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred upon him by section 1962 of the Revised Statutes to limit the right or killing seals when necessary for the preservation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7,500, specified in the said *modus vivendi*.

Twelfth. That in the year 1893 the United States Government itself, through the agents of the Treasury Department, took upon the said islands 7,500 seals; that the said defendant was permitted to cooperate in selecting the seals so killed, and to take, and it did take and retain the skins of those seals, and in this way, and in this way only, the defendant received those 7,500 skins.

In accordance with the power reserved to him in said contract, the Secretary of the Treasury at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of \$3,750.

Thirteenth. That 20,000 bachelor seals could have been killed upon the said islands during the year 1893 in the customary way, without injury to or diminution of the herd, and the said defendant would have taken that number had it been permitted so to do.

45 Fourteenth. That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, 20,000 seal skins, there would have been due to the said plaintiff the \$60,000 rental and for the per capita of seven dollars and sixty-two and one-half cents and the revenue tax of two dollars per skin, the sum of \$192,500, making together the sum of \$252,500—that is, twelve dollars and sixty-two and one-half cents for each seal skin taken; that for the 7,500 received by the said defendant, as above set forth, it owes to the said plaintiff the said sum of twelve dollars and sixty-two and one-half cents apiece, amounting to the sum of \$94,687.50.

Fifteenth. The defendant could have sold 12,500 more seal skins if it had been allowed to take the same on the said islands during the year 1893, at the average market price of twenty-four dollars for each skin; which for the said number of 12,500 which it might have taken, but was prevented from taking by the act of the Government of the United

States, would amount to \$300,000; that for such 12,500 seal skins the said defendant would have been liable to pay, according to the terms of its lease if it had taken 20,000 seal skins during that year, the sum of twelve dollars and sixty-two and one-half cents each, amounting to \$157,812.50, which, being deducted from the price at which such skins could have been sold, namely, \$300,000, leaves as the net loss sustained by the said defendant in consequence of the breach of its said lease by the said plaintiff, the sum of \$142,187.50, which is due and owing to the said defendant by the said plaintiff; and that its claim therefor would be a

46 proper matter of counterclaim or credit in this action, if the conditions prescribed by section 951 of the United States Revised Statutes had been complied with by the said defendant.

Sixteenth. That on the 27th day of November, 1895, M. L. Jeffries, attorney for the said defendant, wrote and caused to be sent to the Secretary of the Treasury a letter stating that the said defendant presented the same as its claim for damages against the United States in the sum of \$283,725, through the Secretary of the Treasury, to the proper accounting officers of the Department of the Treasury for examination and allowance; and that the said defendant was the lessee under its said lease, a copy of which was stated to be annexed to the said letter, and that by the terms thereof the United States had leased to the said defendant the exclusive right to engage in the business of taking fur seals on the said islands; and also stating the agreements on the part of the said defendant under the said lease, and that it might have taken 30,000 fur seals in the year 1893, and that it was prohibited by the United States from taking any fur seals on the said islands during that year; and that it incurred large expenses and that it had faithfully performed its agreement, and that by reason of the United States having prohibited said defendant from taking any seals in that year said defendant had sustained a loss in the said sum of \$283,725; and also stating that that communication was respectfully submitted for the consideration of the accounting officers of the Treasury Department. That on or about December 24, 1895, the Assistant Secretary of the Treasury wrote and caused to be sent to the said N. L. Jeffries, a letter addressed to him as attorney for the said defendant, in which he referred to the said letter of the said Jeffries to the Secretary of the Treasury, dated November 27, 1895, and stated that the claim made by that letter was thereby rejected. Certified copies of these two letters were produced at the trial and put in evidence.

47 Seventeenth. That the said defendant has duly performed all the conditions and agreements on its part under its said lease, with the exception that it has not paid any sum of money to the said plaintiff for the year 1893.

Eighteenth. The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States in entering into the said convention or *modus vivendi* with Great Britain and limiting the catch of seals upon the said islands to 7,500; and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved to the satisfaction of the court that the defendant was at the time of the trial

of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident.

#### FINDINGS OR CONCLUSIONS OF LAW.

First. That the said defendant, having received the said 7,500 seal skins taken from the said islands during the year 1893, is liable to pay the said plaintiff therefor the said sum of \$94,687.50, with interest thereon from the first day of April, 1894; and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant.

Second. That by reason of the breach of the said lease by the said plaintiff, prohibiting the said defendant from taking any seal skins during the year 1893, the said plaintiff is liable to the said defendant for the said sum of \$142,187.50, with interest thereon from the first day of December, 1894.

48 That on account of the same claim of the said defendant against the said plaintiff for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it cannot be allowed as a counterclaim or credit in this action, and the said counterclaim is therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding.

I direct that judgment, so dismissing the said counterclaim and in favor of the said plaintiff against the said defendant for the said sum of \$94,687.50, with interest from the first day of April, 1894, be entered accordingly.

Dated New York, June 9, 1896.

WILLIAM J. WALLACE,  
*Circuit Judge.*

(Endorsed:) U. S. circuit court, southern district of New York.  
United States versus The North American Commercial Company.  
Findings.

49 'ircuit court of the United States for the southern district of  
New York.

UNITED STATES OF AMERICA, PLAINTIFF,	}	Action No. 1.
<i>against</i>		
THE NORTH AMERICAN COMMERCIAL Company, defendant.		

The North American Commercial Company, the defendant in the above entitled action, hereby excepts to the findings of the court therein filed on the 10th day of June, 1896, and the refusal of the court to find as requested by said defendant, as follows:

First exception. This defendant excepts to the fourteenth finding made by the court, and to each and every part thereof, which finding is as follows:

"That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, twenty thousand seal skins, there would

have been due to the said plaintiff the sixty thousand dollars rental, and for the per capita tax of seven dollars sixty-two and a half cents, and the revenue tax of two dollars per skin, the sum of one hundred and ninety-two thousand five hundred dollars, making together the sum of two hundred and fifty-two thousand five hundred dollars; that is, twelve dollars sixty-two and a half cents for each seal skin taken; that for the seventy-five hundred received by the said defendant, as above set forth, it owes to the said plaintiff the said sum of twelve dollars sixty-two and a half cents apiece, amounting to the sum of ninety-four thousand six hundred and eighty-seven and  $\frac{50}{100}$  dollars."

50 Second exception. This defendant excepts to so much of the fifteenth finding of fact made by the court as finds that for the twelve thousand five hundred seal skins which the said defendant might have taken in the year 1893, in addition to the seven thousand five hundred killed during that year, this defendant would have been liable to pay, according to the terms of its lease, if it had taken twenty thousand seal skins during that year, the sum of twelve dollars sixty-two and a half cents each, amounting to one hundred and fifty-seven thousand eight hundred and twelve and  $\frac{50}{100}$  dollars. And to so much thereof as finds that the conditions prescribed by section 951 of the United States Revised Statutes had not been complied with by said defendant in respect to its counterclaim.

Third exception. This defendant excepts to the eighteenth finding made by the court, and to each and every part thereof, which finding is as follows:

"The defendant did not present to the accounting officers of the Treasury, for their examination, any claim for damages by reason of the loss alleged to have been incurred by the defendant by reason of the action of the United States in entering into said convention or *modus vivendi* with Great Britain and limiting the catch of seals upon said islands to seventy-five hundred, and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident."

Fourth exception. This defendant excepts to the refusal of the court to find its sixth requested finding, which was as follows:

51 "That what was intended to be included in the general right granted to the said defendant by the said lease to it was the right to engage in what at the time of the making of that lease was known as the business and definite pursuit of taking fur seals on the said islands for their skins."

Fifth exception. This defendant excepts to the refusal of the court to make its eighth requested finding, which was as follows:

"That it was intended in and by the said lease to the defendant to secure to the said defendant the exclusive right of taking the annual product of the seal fisheries, subject to the regulations prescribed by the statutes and subject also to such further restrictions and limitations as the Secretary of the Treasury, in the exercise of his discretion, should deem

necessary for the preservation of the fisheries, and that in the absence of such restriction by the Secretary of the Treasury said defendant's privileges were coextensive with those of the previous lessee."

Sixth exception. This defendant excepts to the first finding or conclusion of law made by the court, and to each and every part thereof, which finding is as follows :

"That the said defendant having received the said seventy-five hundred seal skins taken from the said islands during the year 1893 is liable to pay the said plaintiff therefor the sum of ninety-four thousand six hundred and eighty-seven and  $\frac{50}{100}$  dollars, with interest thereon from the first day of April, 1894, and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant."

Seventh exception. This defendant excepts to so much of the second finding or conclusion of law made by the court as finds that on account of the said claim of the said defendant against the said plaintiff  
52 for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it can not be allowed as a counterclaim or credit in this action, and that the said counterclaim is, therefore, dismissed.

Eighth exception. This defendant excepts to the direction in said findings that judgment so dismissing the said counterclaim and in favor of the said plaintiff against the said defendant for the said sum of ninety-four thousand six hundred and eighty-seven and  $\frac{50}{100}$  dollars, with interest from the first day of April, 1894, be entered accordingly.

Wherefore, this defendant prays that its foregoing exceptions may be allowed.

Dated New York, June 25, 1896.

CARTER & LEDYARD,  
*Attorneys for Defendant, 54 Wall Street.*

Please take notice that exceptions, of which the foregoing is a copy, were this day duly filed in the office of the clerk of the circuit court of the United States for the southern district of New York.

Dated New York, June 25, 1896.

CARTER & LEDYARD,  
*Attorneys for Defendant, 54 Wall Street, N. Y.*

TO WALLACE MACFARLANE, Esq.,  
*United States Attorney, Post Office Building, N. Y. City.*

(Endorsed:) U. S. circuit court, southern district of New York.  
United States of America against The North American Commercial Company. Action No. 1. Exceptions of North American Commercial Co. Carter & Ledyard, attys. for defendant, 54 Wall street, N. Y. U. S. circuit court. Filed June 25, 1896. John A. Shields, clerk.

53 United States circuit court, southern district of New York.

THE UNITED STATES OF AMERICA	}	Action No. 1.
<i>vs.</i>		
THE NORTH AMERICAN COMMERCIAL COMPANY.		

The issue in this action having come duly on to be tried at a stated term of the circuit court of the United States for the second circuit, held



in and for the southern district of New York, at the rooms of said court, in the post-office building in the city of New York, on the fifteenth day of January, 1896, before the Hon. William J. Wallace, circuit judge, and the parties by stipulation in writing entered into by their respective attorneys of record, and dated and filed with the clerk of said court on the fifteenth day of January, 1896, before the trial of this action, having waived a jury and agreed that the issues of fact in said cause be tried and determined by the court without the intervention of a jury, pursuant to section 649 of the Revised Statutes of the United States;

And the said issues having been tried by the court, and the court having made and signed special findings in writing, and duly filed the same in the office of the clerk of said court, and judgment having been duly rendered for the plaintiffs for the sum of ninety-four thousand six hundred and eighty-seven and  $\frac{59}{100}$  dollars, with interest thereon from 54 the first day of April, 1894, and the costs having been adjusted upon notice at the sum of seventy-one  $\frac{4}{100}$  (\$71.04) dollars:

Now, on motion of Wallace Macfarlane, attorney of the United States for the southern district of New York, it is adjudged that the United States of America, the plaintiffs in the above-entitled action, recover of the North American Commercial Company, the defendant in said action, the sum of one hundred and seven thousand one hundred and eighty-six and  $\frac{25}{100}$  dollars principal and interest, together with seventy-one  $\frac{4}{100}$  (\$71.04) dollars costs and disbursements—in all, the sum of one hundred and seven thousand two hundred and fifty-seven and  $\frac{29}{100}$  (\$107,257.29) dollars—and that the plaintiffs have execution therefore.

Judgment signed and entered this 13th day of June, 1896.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. The United States of America versus The North American Commercial Company. Judgment roll. Wallace Macfarlane, United States attorney, attorney for plaintiff.

55 At a stated term of the circuit court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 16th day of July, 1896.

Present: Hon. E. Henry Lacombe, circuit judge.

UNITED STATES OF AMERICA, PLAINTIFFS,	}
<i>vs.</i>	
THE NORTH AMERICAN COMMERCIAL COMPANY,	
defendant.	

On reading and filing the annexed consent to the entry of this order, and on motion of Carter & Ledyard, attorneys for the defendant in the above-entitled action:

It is ordered that the judgment in said action entered in the office of the clerk of this court on the 13th day of June, 1896, be, and the same hereby is, amended and modified so that the same shall be of the same effect as if it originally contained therein the following, which is hereby

inserted therein and made a part thereof without prejudice to any proceedings since had in said action, namely:

It is further ordered, adjudged, and decreed that on account of the claim of the said defendant against the said plaintiff for damages for breach of the lease mentioned in the complaint in said action, not having been presented to and disallowed by the accounting officers of the Treasury, it can not be allowed as a counterclaim or credit in this action, and that the counterclaim based on such claim contained in the amended answer of said defendant is therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding.

E. HENRY LACOMBE,  
*U. S. Circuit Judge.*

I hereby consent to the entry of the foregoing order.  
Dated New York, July 9, 1896.

WALLACE MACFARLANE,  
*U. S. Attorney, Atty. for Plaintiff.*

We hereby consent to the entry of the foregoing order.  
Dated New York, July 13, 1896.

CARTER & LEDYARD,  
*Attys. for Deft.*

(Endorsed:) United States circuit court for the southern district of New York. United States of America vs. The North American Commercial Co. Order. Carter & Ledyard, attys. for deft., 54 Wall street, N. Y. U. S. circuit court. Filed July 16, 1896. John A. Shields, clerk.

57 United States circuit court for the southern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF,	} Bill of exceptions.
<i>vs.</i>	
THE NORTH AMERICAN COMMERCIAL COMPANY, defendant.	
	} Action No. 1.

UNITED STATES OF AMERICA,  
*Southern district of New York, city and county of New York, ss:*

Be it remembered, that the above-entitled action was commenced on the 26th day of June, 1894, by the United States of America against the North American Commercial Company upon a certain lease made by the former to the latter, dated the 12th day of March, 1890, to recover the amount claimed to be due said plaintiff for the year ending April 1, 1894, and that the amended answer of the said defendant was filed and served on the 22d day of December, 1894, which, among other things, contained a counterclaim for damages on account of the breach of the conditions of said lease on the part of the said plaintiff, and that a reply to such counterclaim was filed and served on the 21st day of January, 1895; and thereafter, to wit, on the 15th day of January, 1896, at a circuit court of the United States for the southern district of New York, held at the court rooms in the post-office building in said city, the issues so joined were brought on for trial, and the parties to the said action did



58 by stipulation in writing, entered into by their respective attorneys of record, and dated and filed with the clerk of the said court on the said 15th day of January, 1896, before the trial of this action, provide that the issues of fact therein should be tried and determined by the court without the intervention of a jury, under sections 649 and 700 of the Revised Statutes of the United States. The said issues were on that day and following days tried by such court without a jury, and that at such trial the said plaintiff appeared by Wallace Macfarlane, esq., United States attorney for the southern district of New York, and Max J. Kohler, assistant United States attorney for the same district, and the said defendant appeared by Carter & Ledyard, its attorneys, and James C. Carter, esq., N. L. Jeffries, esq., and George H. Balkam, esq., of counsel, and upon such trial of the said issues the counsel for the said plaintiff, to maintain and prove the said issues on their part, introduced the following evidence:

A certified copy of the advertisement of the Secretary of the Treasury, dated December 24, 1889, calling for bids for the lease mentioned in the complaint, an extension of time for making such bids thereto attached. The papers were admitted and marked "Plaintiff's Exhibit 1."

The three bids of the defendant in a pamphlet. The bids were admitted and the pamphlet marked "Plaintiff's Exhibit 2."

A certified copy of such lease, which was admitted and marked "Plaintiff's Exhibit 3."

Certified copies of the instructions of the Secretary of the Treasury to the special agent of the United States Government in charge of the islands mentioned in the lease—St. Paul and St. George—in the years 1891, 1892, and 1893. These papers were admitted and marked "Plaintiff's Exhibits 4, 5, and 6," respectively.

A certified copy of a telegram from the Government to the agent, which was admitted and marked "Plaintiff's Exhibit 7."

59 A letter from the Department to Noah L. Jeffries, attorney for the defendant; also a letter from the Secretary of the Treasury to Special Agent Williams, which were admitted and marked "Plaintiff's Exhibits 8 and 9."

A letter from Noah L. Jeffries, attorney for the defendant, to the Secretary of the Treasury, dated November 16, 1893, which was admitted and marked "Plaintiff's Exhibit 10."

A certified copy of the demand by the Treasury Department upon the defendant for various items claimed in this action, which was admitted and marked "Plaintiff's Exhibit 11."

For the sole purpose of showing the receipt of this demand and the nonpayment by the defendant, a letter from the defendant, by N. L. Jeffries, its attorney, dated May 25, 1894, which was admitted and marked "Plaintiff's Exhibit 12."

Counsel for the plaintiff then called the attention of the court to the agreement between the United States Government and Great Britain known as the *modus vivendi*, upon which the United States agreed to prohibit the killing of seals upon the said islands during the year 1893, except 7,500 for the subsistence of the natives, the same being found in 27 Statutes at Large, page 952; also the first *modus vivendi*. (27 Stat. at L., p. 980.)

Counsel for the plaintiff then called as a witness for the plaintiff—

JOSEPH B. CROWLEY, who was duly sworn, and testified as follows:

Direct examination by Mr. MACFARLANE:

I am special Treasury agent of the Government of the United States in charge of the fur-seal islands in Alaska. I was appointed in April, 1893, to that office. I was on both St. George and St. Paul islands during June and July, and possibly during a part of August, 1893. I would not say exactly the date when I came away from there. It was after the sealing season had closed. It was either the last of July or possibly early in August. I was there during the whole of the killing season of that year. I am the Joseph B. Crowley who received the instructions, Plaintiff's Exhibit 6.

I went to the islands from San Francisco by the steamer Ferrollon, chartered by the defendant. During that season the local agent of the defendant on the island of St. George was Capt. Daniel Webster, and on the island of St. Paul, Mr. J. C. Redpath, and Mr. George R. Tingle was there, off and on, as the superintendent of the defendant company.

The defendant has on each of the islands what is regarded as the company house, where their agents live and do business, and where the Government's agents take their meals. They have also salt houses and places where the skins are kept after they are taken from the seals, and also warehouses for the purpose of storing their goods.

In April, 1893, I met in San Francisco Mr. George R. Tingle, the superintendent of the defendant. He went to the seal islands on the same steamer that I did. I talked with him about these instructions. He had a copy of them.

At the end of the killing season in 1893 the seal skins were delivered to the defendant. I was present at the time the skins were delivered on both islands. I saw them counted. A representative of the defendant was present at the count—Mr. Redpath on St. Paul and Capt. Webster on St. George. Possibly George R. Tingle was present on one or, maybe, both islands. Receipts therefor were taken by the agents in charge of the islands. Those skins were brought to San Francisco by the Ferrollon, and I came down on her. I saw those skins counted again in San Francisco. There were 7,500. The manner in which the seal skins were taken in 1893 was, that when it was ascertained that a sufficient

number of seals are on a rookery to warrant a drive the native chief is usually authorized to send natives out to drive the seals to a killing ground, and that is done in the morning early, when the killing is to be in the morning, and the local agent of the North American Commercial Company takes charge of the natives and goes onto the killing grounds, and the superintendent of the killing directs what seals shall be killed and what shall not be killed.

In the year 1893 the Government agent in charge decided when the drive should be made. That agent was myself or Col. Murray, who was on St. Paul with me, or Capt. Hall, on St. George. When I decided that there were enough seals on a rookery to warrant a drive, I notified the agent of the defendant that he might make a drive. In the season of 1893 I notified the local agent of the defendant, Mr. Redpath. When

he was so notified, the native chief was notified, sometimes by me, to take the natives and make a drive the next morning, and when we got up the next morning the seals would be on the killing ground. Those actually present at this season in the killing grounds were myself or Col. Murray and Mr. J. C. Redpath and the natives who assisted in doing the killing. No seals were killed before my arrival or the arrival of the local agent of the defendant. Mr. Redpath on the occasions when the seals were killed usually had a club in his hand. I have seen him club seals the same as the natives. He would point out to them what grade he wanted. Mr. Redpath, on St. Paul, Capt. Webster, on St. George, selected the seals to be killed from the drove at the killing grounds in the season of 1893. Mr. Redpath actually engaged personally in the clubbing of seals many times in my presence; in fact, he was about the best clubber on the island.

The Government agent did not instruct the natives or the agents of the defendants what seals to kill, unless it would possibly be a crippled or maimed one. I was present at a very large majority of the  
62 killings in 1893. It is only just possible that I was absent at any time. I saw one or two killings on St. George.

The skins of the seals killed in 1893 immediately after the killing were taken by the agent of the defendant to the defendant's salt house and there salted by the natives. They remained in the custody of the defendant until shipped, and were handled by them for the purpose of curing throughout the season.

When I decided that there were enough seals on a rookery to make a drive, I notified the local agent of the company that he might make a drive, and then the seals were driven to the killing grounds; they were surrounded by the native sealers, some of whom were skimmers and some clubbers. The club is employed to kill the seals.

In the killing season the natives are employed in killing, skinning, and preserving the skins. After the killing season those skins were placed on board the defendant's steamer and brought to San Francisco. From the time of taking the skins at the killing grounds until they were shipped they were in the custody of the company. They were taken to the defendant's storehouse, where they were bunched and counted under the supervision of the Government agents and in the presence of Mr. Redpath. The compensation of the natives, as fixed by the Treasury, for killing, salting, and loading the sealskins is fifty cents for each skin. The amount so paid by the defendant is distributed by its giving each native a separate amount of credit on its books, which is paid to him in supplies. The Government pays the natives nothing for killing the seals, salting the skins, and loading them on board the defendant's ship.

#### Cross-examination by Mr. CARTER:

This was my first year in this business. I had never been on  
63 the seal islands before early in June, 1893. The killing commenced only a few days after my arrival. There was a local agent of the Government on each island who usually attends to the routine business, and I supervise the business of both islands, being sometimes on one, sometimes on the other, principally on St. Paul in

1893. I went to St. George in 1893 three or possibly four times, remaining sometimes twenty-four hours, sometimes three or four days, possibly as long as a week. The rest of the time I was on St. Paul. The distance between the two islands is about forty miles.

The first drive, only a few days after my arrival, was on St. Paul. In regard to the first drive I have this memory—that directions were given to the local agent of the company that he might make a drive on a certain number of seals from certain rookeries on the islands. I will not be positive whether I or Colonel Murray gave that direction. Colonel Murray was in charge of St. Paul; its local agent at the time. I was aware before I gave that direction that conditions existed which justified a drive. If I did not give that direction myself, I instructed the local agent to do so. I was first satisfied that a drive could be made, and then I either directed the local agent of the company myself that he might make it or told the local agent of the Government, Colonel Murray, to notify him. Sometimes I or the other Government agents gave directions to the chief of the natives about drives, and I sometimes gave instructions to the local agent that he should give such instructions to the chief. I know that I did not do so in all cases. I would frequently be with Mr. Redpath and would inform him that he might make a drive, and he would go and inform the chief at that time himself. That I know to have been done, but just the exact time that it was done I could not say—whether it was the first or the third killing. I know that sometimes I communicated with the chief myself or that the local Government agent did, telling him that a drive might be made. I

64 cannot give the exact drive when I communicated with the chief or with the local Government agent. The fact was always communicated to the company's agent and afterwards to the chief of the natives that he might make a drive. He always confers with the Government agent before making a drive; has always done so ever since I have been there. That has been the rule since I have been there and it was always done during 1893. The Government agent thus communicated with was sometimes myself and sometimes one of the local agents.

I think the natives did not have any skins in 1893 for clothing. Possibly some seven or eight were taken by my subagent or by one of the local agents of seals that were crippled or maimed in the killing, and I think such skins may have been given to the natives. That has been done in one or two years on the island. I think it was in 1893, but would not say positively.

I cannot say from memory how many drives were made on each island in that year. I did not go around the young seals very much when being driven. I usually had that done by the natives. I accompanied them on several drives; it is not a very laborious task. I noticed the condition of the herd. Not having seen it in former years, I would not want to compare it to this condition in such years. There were a good many seals there. The young male seals were tolerably abundant. There were enough for me to obtain a quota of 7,500. I got that many at least. I did pay considerable particular attention to the actual condition of the herd. I went over the rookeries quite a good deal. I observed them more or less every day in the week throughout the summer. I went around from one to the other.

I think about 1,200 was the largest killing in any one drive made in 1893, and that was on St. Paul. I think it was in the latter part of June. I was present at that drive. Quite a number of oversizes  
 65 and undersizes were driven back. We killed possibly 40 to 45 per cent of the number driven. If we killed 1,200 on that day, we probably turned back almost a quarter more than that number. The means I have of forming that conjecture is having counted the number of seals turned back when the clubbing was done and having counted the number killed out of that same bunch. I count those frequently, but would not be positive that I counted them on this special occasion, but I did on many drives.

**Redirect examination by Mr. MACFARLANE:**

As a rule a great many more seals were driven than killed. At the killing grounds the local agent of the defendant directed the class of seals that should be killed and he took a certain grade of a certain size, and all those below or above that size were turned back. All the seals in the drove whose skins the defendant's agent considered merchantable would be killed and the others turned back into the sea or to the rookery.

The natives are not usually clothed in seal skins; they wear the same grade of clothes that people wear in the States, made as a rule of woollen cloth, and they are very well dressed.

In 1893 no seals were killed by the natives for their own purposes apart from those killed at these drives. Portions of the carcasses were taken by the natives and used for their support. The part not so used lay on the ground and decayed; the defendant made no use of the carcasses after the skins were taken excepting occasionally for food. The defendant made no oil since I have been there.

I had watchmen at the rookeries. I based my decision that there were enough seals in the rookery to authorize a drive upon my own inspection and information from others. A good number of times I went to the rookeries myself and took personal observations. Some of the time

Colonel Murray would go and I would not be with him, and other  
 66 times information was brought by the natives who had inspected a rookery when there had not been a drive made for some time, and if they reported to Colonel Murray or myself that a sufficient number were on to make a respectable drive a drive was ordered, as I have described. The natives and the local agent of the defendant killed the seals on the killing grounds. The local agent of the defendant told the natives what seals to kill. The Government agents gave no such instructions except in respect to crippled or maimed seals.

The defendant exercised the right of rejection or selection in respect to the skins, but it always took away all the skins from the islands. A portion of the 7,500 spoken of were rejected, but were all taken from the islands by the defendant.

**Recross-examination by Mr. CARTER:**

The stogy skins were rejected. I believe the number of those was 121. Sometimes one would be rejected on account of its being a small grade. A few might be found rejected upon having been cut in skinning them.

I should say there were eleven rookeries on St. Paul, all named and separate from each other, at least so far as the name is concerned. One comes very near joining on to the others, and some are widely separated by quite a distance. The island is nearly thirteen miles in length. By rookery I mean a space where the seals haul out. In hauling out on each rookery the breeding females and breeding males go together and the young male pups by themselves. There is a line sufficient to distinguish the difference between them without any trouble.

The driving is made entirely from these young male seals. These drives in 1893 on St. Paul were made from eight rookeries. There were three from which I did not drive. There are five rookeries on St. George. Drives were made from every rookery on that island in 1893. I made a return of the numbers taken at each drive to the Secretary of the Treasury, which contains the dates of the drives, the number taken, and the rookery where they were driven. This taking, I should say, was from about the 10th of June till the 10th of August.

CHARLES J. GOFF, sworn and examined as a witness for the plaintiff, testified as follows:

Direct examination by Mr. MACFARLANE:

I am not in the Government service now. In the years 1889 and 1890 I was special agent of the Government in charge of the seal fisheries, and I was on the islands of St. George and St. Paul in the seasons 1889-1890. I was the agent in charge during 1890.

In 1890 the defendant had an establishment on those islands and its representatives there. They were Mr. George R. Tingle, who was agent in charge; Mr. J. C. Redpath, local agent on St. Paul, and Daniel Webster, on St. George.

Seals were killed on those islands in 1890. The method of driving and killing seals in 1890 on those islands, with respect to the selection of the seals, was as follows:

The agent of the defendant would decide when he would make a drive and would send the natives then to bring the seals to the killing grounds and they would club the seals and take what skins they desired. At the killings in 1890 I was generally present or Prof. Elliott or Mr. Nettleton, who was assistant agent on St. Paul. At those killings in 1890 the representatives of the defendant selected the seals to be killed. The skins were taken to the salt house, salted and cured, and at the close of the season they were loaded on board the steamers of the defendant.

The natives were allowed every year to kill some pups for food and to dispose of their skins, which were not merchantable and were of no great value.

Cross-examination waived.

(Plaintiff rests.)

68 Counsel for the defendant then moved the court to dismiss the complaint of the plaintiff on the ground that the plaintiff had not performed the conditions of the lease on its part and given the defendant the right which it stipulated to give, because it prohibited the defendant from taking any seals whatever in the year 1893.



The court overruled or denied the motion, and the defendant then and there took an exception to such ruling, and thereupon counsel for the said defendant, to maintain and prove the said issues on its part, gave in evidence the following :

JOSEPH STANLEY-BROWN, sworn and examined as a witness for the defendant, testified as follows :

Direct examination by Mr. CARTER :

I reside in Washington, D. C., and have for about 30 years. I am in the employment of the defendant as superintendent. The place for the performance of my duties during the summer season is at the Pribilof Islands of St. George and St. Paul. I have known those islands since June, 1891, when I first visited them in the capacity of special agent for the Treasury Department. I continued in that employment for two years for the purpose of visiting the islands, and the third year for the purpose of visiting Paris to attend the sessions of the Paris Arbitration Tribunal. I visited the islands again in the season of 1894 and 1895, but was not there during the year 1893. I visited both islands. St. Paul is about eleven miles long, with a varying width of six to eight miles, and St. George is about eleven or twelve miles long, with a varying width of five or six miles. By profession I am a geologist.

On St. Paul there are ten rookeries and on St. George there are 69 five. Those on St. Paul are larger and cover a larger extent of territory than those on St. George. They are strips of ground of varying width along the shores of the islands and are areas which are occupied by the fur seals. I could not be precise as to the width; the maximum width would be a quarter of a mile to the extreme limits of the rookeries as they were in their maximum numbers. The minimum limit would be about fifty feet.

The shores upon which the breeding grounds are are usually rocky. The shores upon which the hauling grounds are are frequently sandy and low lying. The shores of St. Paul are more low lying than those of St. George, the latter being chiefly confined to bluffs. There are only about five places on St. George where the seals could readily haul out away from the surf. The hauling grounds are in the majority of cases quite distinct from the breeding grounds. Where they coalesce the hauling grounds are at the rear of the breeding grounds. I distinguish between hauling grounds and breeding grounds. Both are included in the term rookery. Breeding grounds are the areas upon which the old bulls first haul out and gather about them their own harem of cows. Hauling grounds are the areas upon which the young, immature seals haul out—those who are not permitted by reason of their immaturity to go upon the breeding grounds. Should they go there, they would be promptly driven away by the old bulls.

The first seals arriving at these islands are the old bulls. They begin to come as early as April; they have appeared on St. Paul and St. George as early as the first week in April, if my memory serves me correctly. They are followed a month later by the first arrival of the largest and strongest young immature males or bachelor seals. They in turn are followed at the close of May or the early part of June by the females.



70 The young females do not come in the early part of the season with the breeding females. Where the young females go and what their career is, is still a somewhat mooted question among naturalists.

They certainly do not appear upon the breeding grounds in the early part of the season. There are two theories in regard to it, the one that they go later in the season after this harem system is broken up, and are then covered by the males. The second theory is that they receive the males in the water along the rookery front, and do not come on the breeding ground proper until they come to bear their pup the first year. Substantially, I find the breeding grounds proper occupied by the mature males, and the hauling ground occupied for the most part by the young males.

After they haul out, the old breeding bulls which are upon the breeding grounds do not go into the water for eighty or ninety days after their arrival there. They do not begin to go into the water until from the 10th to the 20th day of July, when their breeding service is over, and then they go into the water and disappear.

The female upon the delivery of her pup, and being served by the bull is then permitted to go into the water in search of food. She is not permitted until she has been served by the bull. She is not permitted by reason of compulsion on the part of the old male. He exercises this compulsion by seizing her by the back of the neck if she insists on going. This discipline is perfect and complete.

In respect to the young males going into the water, from my own observation I am inclined to believe that if the young males were never disturbed they would spend most of their time in playing and frolicking along the sands or on the hauling grounds. When the drive is made and those to be killed are selected, and those not killed are turned back into the water, they invariably seek the hauling grounds, and haul out and go on with their sleeping or their playing. While they are around

71 on the land they are either sleeping or frolicking as a Newfoundland dog would. They go into the water. The bachelors eat very little during the summer; it seems to be a training season for them to endure the long fast which may be required of them on the breeding grounds later on. This is shown by the fact that we rarely find food in the stomach of the young bachelor from one end of the season to the other.

As to the age at which the young males succeed in forcing their way upon the breeding grounds, our best knowledge upon that is that it is from five to seven years. If he is an abnormally large and lusty fellow, he may seek admission to the rookery at five, but it is more usual at six or seven.

In taking the young males for the purposes of commerce, such as are taken by the lessees of this island, the limits of age are two and four years. We may get a four-year old seal, which we call a smooth male—that is, the patches of hair which we call wigs on the shoulders has not begun to grow sufficiently to make his pelt less valuable; if that seal is found he is usually taken. The better class of skins are from the two and three year olds.

The daylight in that region, of course, extends in the summer season from twenty to sixteen hours, and when it is ascertained that there are a

sufficient number of seals upon the hauling grounds to constitute a good drive, the natives under the charge of one of their chiefs, a competent man, are sent to make the drive. The drive is made very early in the morning, going usually about twelve, sometimes at one, and sometimes at two o'clock in the morning, and the seals are then separated on the beach.

The natives will go to the leeward of the seals, and first one will start and run a little ahead, and when he has gone forty or fifty feet the next native will follow him, and so on until there is a string of natives between the seals and the beach. They will usually run, if there is near proximity of the seals to the beach, in a crouching position, and they will suddenly all rise up and frighten the seals to landward. Having once got them separated, there is no difficulty whatever in driving them slowly and  
72 quietly as you would a flock of sheep. Three men will drive a large band of seals.

They are driven then by slow stages to the killing grounds, which are at varying distances, the longest drive that has been made in recent years being a mile and a half or two miles. They are driven to the killing grounds, near which is located the salt house at a convenient distance. There the seals are taken out in small pods of thirty or forty and driven a little to one side from the main herd. The person having charge of the killing indicates those to be struck on the head, and a circle of clubbers—four or five—surround those little pods and strike the seals on the head. The skull is very soft, and death is instantaneous, and the rejected animals are turned back to the water. The killing ground is always selected at water communicating to the sea, so that the rejected ones may return.

The rejected ones are not driven back the whole distance on the land. On St. George Island the water is about 200 feet distant, on St Paul I should think not over 500 or 600 feet. They are sent back either because they are so large that the skin would be unmerchable and undesirable, or because approaching the age when it can go on the breeding grounds, or because too small, only a yearling, and we are forbidden by law to kill a yearling. This process of driving does not at all interfere with the breeding grounds, and makes no disturbance whatever among the other seals. The precautions adopted on the islands for the purpose of quiet and allowing the seals to repose in their breeding places are that the use of firearms is prohibited, dogs are not allowed on the islands, visitors are not permitted to go on or near the breeding grounds unless it is a question of some importance, and then a competent guide is sent with them, so that there shall be no disturbance of the breeding grounds. There are many places where the breeding grounds may

be observed without any disturbance whatever; for instance, there  
73 are cliffs from which you can look down upon these seals and the seals would not recognize your presence there at all. Every care is exercised for their repose upon the breeding grounds.

At the present time, on account of the depleted condition of the rookeries, young males have no difficulty in getting to the hauling grounds in the rear of the breeding grounds. I have no personal knowledge as to such means in the crowded condition of the rookeries.

During my life upon the islands there were fights between the old bulls, and I have seen some very savage encounters. They are quite common experiences there.

The subject of controversy is the females. Those encounters are deathly. I have seen some very badly cut up bulls and some very badly cut up cows—large rents in their sides where they have been seized. I saw one case that I distinctly call to mind, in which a poor female was seized at either end by a bull, and the consequences to the female were very unfortunate and very distressing to witness. She was mangled and torn very badly.

The habits of the seals are such that the young males can easily be selected from the rest of the herd and driven to a suitable place and suitable individuals slaughtered without interfering with the breeding operations at all or in the slightest degree.

During the season more than one drive is made from the same rookery, sometimes quite a number. At some times the rookeries exhibited a much greater number of seals than at others. If there are only half as many to-day as yesterday, the other half may be out in the water. If the conditions render them uncomfortable on land they will seek the water. Severe showers of rain, in which the sand is apparently worked into their pelts, seem to be disagreeable to them, and they will go off

into the water. They are from time to time going into the water owing to climatic conditions. I was on the islands in 1891, 1892, 1894, and 1895. I was not there in the year 1893-4 and can not say anything touching the condition of the herd.

Q. What was it in the year 1892?

MR. MACFARLANE. Do you mean in regard to numbers?

MR. CARTER. Yes.

MR. MACFARLANE. I will object to the question on that point. It may become an important question. If the limitation on the Secretary's power to reduce the quota with an accompanying reduction of the rent is held to be a term of this lease, then the reduction must be made with a view to the preservation of the herd. That is the statutory language if it is held to be a part of this present lease. Now, the Secretary of the Treasury is the person to decide that, and he decides that on the information of that he receives, and his decision can not be questioned or impeached in the absence of some bad faith or fraud any more than the decision of an architect in any great public work where he is given power by the final survey to settle every possible dispute and conclude the other parties; and I shall take the position in regard to such questions that the Secretary of the Treasury's ruling on that is conclusive.

MR. CARTER. But he never made any.

MR. MACFARLANE. We contend that he did.

THE COURT. However that may be it is unnecessary to rule on it now.

MR. MACFARLANE. It seems to me this question is directly to that effect. He is asking Mr. Brown as to the condition of this herd in 1892. Of course that does not necessarily determine the condition of the herd in 1893.

MR. CARTER. It is a little distant, but it has some bearing.

THE COURT. I will allow the question.

In respect to the condition of the herd in 1892 over 1891 there seemed to be some slight diminution of the herd in 1892 over 1891, not a diminution that you could readily show by the means of charts.

75 We thought we could see some little diminution of the herd.

There was not as many as there were in 1891. In 1892 7,500 young seals were taken.

Q. How many more might have been taken?

Mr. MACFARLANE. I object to the question as immaterial. I object to it because the witness is not qualified to answer it, being able to give only a speculative opinion. I object to it on the ground that the Secretary's determination of the quota was conclusive.

The COURT. You may ascertain from the witness whether he was sufficiently cognizant with the matter from his observation.

Mr. CARTER (to Mr. Macfarlane). His honor says you may ascertain the extent of his knowledge.

Mr. MACFARLANE. I object to the question on the grounds stated.

The COURT. I think, Mr. Carter, you had better qualify him.

Mr. CARTER. I supposed I had, in a measure.

Q. You say you have been upon both islands?—A. Yes, sir.

Q. State, if you please, what the extent of your acquaintance with these herds was, and the facts upon which your acquaintance is based; that is to say, how much attention you gave to that subject and how often you visited these rookeries, and how long your observations over them extended. Give us some idea.

The COURT. For the purpose of giving your opinion on the question which was put to you in reference to 1892.

Mr. MACFARLANE. I desire the same objection to be noted to all this evidence on the record, that it is not a subject for expert testimony, and is immaterial in the other respects that I have already stated.

The object of my visit to the Pribiloff Islands under the appointment of the Secretary of the Treasury was for the purpose of ascertaining the condition of the seal herd. In pursuance of instructions from the Secretary of the Treasury I made a general map of each island. I made a large scale map of the fifteen rookeries, on the large scale of 264 feet to the inch. I plotted upon each one of those charts the areas of the breeding grounds, and the hauling grounds, and in 1892 I repeated those observations, plotting them upon the charts. That required my almost daily attendance upon the rookeries, either of St. Paul or St. George Island. I was required also to observe carefully the habits of the seals. To do so involved watching the rookeries hour by hour, and I can say that at least one-half of my working hours on the Pribiloff Islands in those two seasons was spent upon the rookeries. I was therefore familiar, approximately, with the numbers of the seals in the rookeries from time to time, including the number of young males.

By Mr. CARTER. How many more might have been taken in 1892 than the 7,500?

(Objected to as immaterial on the grounds already stated, on the ground that the witness is not qualified to testify as to the number, or as to how many more than 7,500 could have been taken with safety to the herd; on the ground that the question is not a proper subject of expert evidence; and that the Secretary of the Treasury's conclusion or decision in respect to the number to be taken is conclusive, and if the question is allowed, the witness must be confined to how many could have been taken without detriment to the herd.)

Mr. CARTER. That is what I mean. I mean that and will add that.

In 1892 there could have been taken 90 per cent of all the young male seals on the hauling grounds at St. Paul and St. George without affecting the future increase of the herd. The subject of how  
77 many seals could be safely taken was naturally a subject of discussion among the gentlemen who were present on behalf of the Government that summer. I took the position, in discussing it with my colleagues, that we could have taken from twenty-five to thirty thousand skins upon the islands in the year 1892 without detriment to the herd.

We could have taken more skins than that without detriment to the herd, because there was at that time upon the breeding grounds ample male life to serve the females which were there. Those skins would not have been all merchantable and valuable skins.

I think we could have taken about 25,000 marketable skins. The number was less in 1892 than in 1891, but it was not materially less. We had great difficulty, I remember, in that year in plotting and charting what that difference would be. It was not an easy matter for us. Still it was my opinion that there were less. There had been 28,000 skins taken in Behring Sea, and those skins were largely the skins of females, and it made itself manifest in the rookeries. I mean that in the year 1891, the previous year, 28,000 skins were taken before the modus vivendi succeeded in getting in operation in the year 1891. I mean that number had been taken on the sea by the pelagic sealers and manifested itself by the slight decrease in the seal herd on the breeding grounds. I made reports of my operations to the Government in the form of affidavits. I think I made two. They are in the case and counterease of the Paris tribunal. They were put in the form of affidavits because they were intended to be used before the Paris tribunal.

Cross-examination by Mr. MACFARLANE:

So far as the breeding grounds were concerned, it would have been difficult in 1892 for me to arrive at an approximate number of seals on them, but so far as the hauling grounds were concerned it was not  
78 so difficult, because we were continually having them under our supervision by driving them up and turning back a certain number, so that we were able to form some estimate of them. My recollection in regard to my report as to the decrease of the herd in 1892 is, that we deemed the decrease so slight that it would not be safe for us to make any public statement before the tribunal concerning it. I think I made a report to the Secretary of the Treasury in respect to the decrease of the herd.

In 1892 I was agent in charge of the islands and not there as an expert concerning seals. It was as agent in charge that I made a report. It was not an affidavit, but just an official report, if my recollection serves me. I can not recall whether I stated in the report that there had been a constant decrease of the herd, or whether I said anything in that respect.

I made a number of photographs of the rookeries to accompany the report. I recall one instance, one area which I endeavored to photograph twice, hoping thereby to show some decrease, and I think in that particular case it did show some slight decrease. I do not know of any census of these seals being taken in 1892, or that the number on the island was actually counted. They were certainly not counted by me. I have no knowledge as to whether they have been counted since.

My estimate that 25,000 merchantable seals could have been killed without detriment to the herd is based on my general observation of the seals upon the islands, and the further fact that some of the largest rookeries were not driven from at all, and on the fact that the number of seals which we turned back into the water and the infrequency of the drives that year.

I attended the Behring Sea tribunal in Paris in the official position of an expert from the United States. I was secretary of the first commission in 1891. It was for the purpose of the Paris tribunal that I made my reports in the form of affidavits.

79 The skins that were taken in 1892 were placed in the salt house of the defendant. It is hard for me to answer as to whether they were delivered to the defendant. I was the agent in charge of the Pribilof Islands at the time, and remained there until after the annual receipt of skins by the defendant's steamer that year. The skins were delivered on board the defendant's steamer. They were counted out of the salt house in the presence of myself and the agent of the company. They were all merchantable that year. There were no stagy skins that year except the skins taken in the fall previous to my going there. I took the usual receipt from the agent of the defendant for seal skins in 1892, and they were put on board the defendant's steamer and carried away.

Redirect examination by Mr. CARTER:

In 1892 the Government officer directed when the drives were to be made for the taking of the 7,500 seal skins taken during that year, and I was such officer, or, in my absence, the assistant Government officer designated the hauling grounds from which the drives were to be made. There may have been some exceptions, but I think not. I recall none. When the killing came to take place the selection of the seals to be killed was on the island of St. Paul, made by Mr. Redpath, and on the island of St. George, by Mr. Webster.

By Mr. MACFARLANE:

They were representatives of the defendants, and were requested to exercise supervision over those skins in order that a good quality might be procured.

By Mr. CARTER:

I have always taken the position that it was not practicable to count the number of seals on the breeding grounds. It was equally difficult on the hauling grounds, except that you had some criteria  
80 to go by, which you did not have in the case of the breeding grounds, and an actual enumeration, hard and fast, and counting every seal, I think would be an impossibility, because seals were going into the water and coming back; being in motion, counting would be impossible. I believe attempts have been made to reach the number. I believe the method of determining the number of square feet in the rookery, and how many seals would occupy a number of square feet, has been adopted at one time; that is, to measure the whole area of the rookery and then the proportionate part of that area which a single harem would occupy, which is a very different thing from counting.



The assumption upon which it proceeds, that there is an equal distribution of the seals, carries a very strong element of error, and it was agreed, as I think by all reasonable people, that that manner of counting seals, at all events at the time when they were numerous, was impossible. After my absence at Paris in connection with the a bitration, I returned to the islands in June, 1894, as the superintendent of the defendant. I was not then in the employment of the Government. I was there during the years 1894 and 1895, and returned from there the 29th day of August, 1895, after the season was over.

The condition of the herd in 1894 was almost analogous to its condition in 1892. There was a very slight diminution observable on the breeding grounds. The hauling grounds appeared to be in the same condition that they were in 1892. In 1894 16,030 seals were actually taken. The quota allowed was 20,000. The taking stopped at 16,030 because the Government officer concluded after that number had been taken that that was as many as could properly be taken, and stopped the taking.

The condition of the herd in 1895 was not so good as in 1894, and there began to be a somewhat noticeable decrease in the hauling grounds now as well as in the breeding grounds. In 1895 15,000, the full quota allowed by the Government, were taken.

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By Mr. MACFARLANE:

Of the 16,030 taken in 1894, 1,000 or more were skins that came over between the close of the preceding season and the beginning of the new season. That is the way the quotas were always counted. After the close of the summer season, between May and June and October, and after the general agent of the Government had left the island, between November and May, the beginning of the summer season of the following year, a certain number of seals were commonly taken for food by the natives. It is common knowledge that the company's agents tell the natives what sort of seals to kill for food during that period, and those skins so taken are salted and stored just as the skins taken in the summer. I made a report to the Secretary at the conclusion of the season of 1892 in reference to the depletion of the herd. In that report I said: "It is naturally the object of the pelagic sealers to increase the efficiency of their schooners by carrying as many small boats or canoes as possible. It is evident, therefore, that the only just estimate of the increase of diminution of the seals at sea is the average number of seals taken per small boat during the same period and in the same localities. Taking these conditions as applied to the Canadian sailing fleet, a comparison of their catch per boat in 1891 with that of 1892 will show that there was no increase in the catch per boat, but, on the contrary, a trifling falling off. That it is not greater still is due to the fact that during the past two years there has been practically no killing upon the islands." I remember that. I also said: "This makes good the loss at sea, temporarily diminishes the rate of decrease, and apparently proves to the satisfaction of the Canadian sealers the correctness of the position taken by them, that we should abandon the killing of all seals upon our own possessions and leave the Pribiloff Islands as great seal preserves for their benefit." I remember and recall that. I also said: "Despite

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the pretense of the sealers that there are more seals than ever in

the water, despite the self-delusion in which they are now indulging, if indiscriminate slaughter continues and not a seal were killed on land, the rookeries of the Pribiloff Islands are doomed." I remember that.

I took a very pessimistic view of the fate of the seal industry if this open-sea sealing was continued as uncontrolled as it had existed prior, and those views are being verified. It was in Behring Sea only that during the seasons of 1891 and 1892, while the *modus vivendi* was in operation, that there was at least a theoretical attempt to prevent open-sea sealing entirely on the part of British and American vessels. I remember that the *modus vivendi* provided for that very thing so far as Behring Sea was concerned.

I have made one affidavit as the result of my investigation in May, 1892, and another in December, 1892, and those affidavits were a part of the testimony of the United States before the commission. The American commissioners made a separate report. I agree with the following statement contained in their report: "It may therefore be accepted as undisputed fact that the seal population of the islands is greatly below what it was for many years, and there is little doubt that if the causes which brought about this reduction are permitted to continue in operation commercial extinction of the herd within a few years will be the inevitable result."

In respect to the statement in the report of the American commissioners as follows: "The aggregate size of the areas formerly occupied is at least four times as great as that of the present rookeries," I should hesitate to admit the exact figure, four, but they were certainly very much greater in the years beginning with 1870 and running up to 1890 than they were in the following years. I have never ascribed the absence of a sufficient number of young males in the season of 1891 and 1892 to the killing of too many of them in the previous years.

83 In the seasons of 1891 and 1892 I made an examination of the number of dead pups found on the island. They were not counted completely; they were only partially counted; but our best judgment placed the number at about 15,000. I think I stated somewhere, if my memory serves me right, that the number would possibly run up much larger than that.

In reply to a question by the court as to what the witness meant by dead pups, he replied: "In 1891, before the *modus vivendi* could be put in operation, a certain number of pelagic sealers, with schooners, found their way into Behring Sea. They sealed from five days to five weeks before they could be cleared out of the sea by the revenue-marine service or by our war vessels. They were enabled in that short time, by reason of the massing of the seals in Behring Sea, to capture by shotguns in the open water about 28,000 or 29,000 seals, 80 per cent of which were females. Their pups were upon the shores, and, lacking their mothers' milk, they died of starvation.

By Mr. MACFARLANE:

The failure of so large a number to reach maturity, or even a killable age, in a commercial sense, would unquestionably have a natural tendency to decrease the number of killable seals that would come back to the islands in succeeding years.

My affidavit of May, 1892, is in vol. 2 of Appendix to the case of the United States in the Behring Sea Arbitration, pages 10 to 20. I remember saying in that affidavit as follow: "After observing the habits of seals for a season I unhesitatingly assert that to satisfactorily account for the disturbance to vegetable life over areas whose extent is visible even to the most careless and prejudiced of observers would require the presence of from two to three times the amount of seal life which is now to be found upon the islands. That there has been enormous decrease  
84 in the seals there can be no question." That stated my conclusion on that subject. In concluding that affidavit I stated as follows: "As a result of my investigations I believe that the destruction of the females was carried to the point in about 1885 where the birth rate could not keep up the necessary supply of mothers, and that the equilibrium being once destroyed and the drain upon the producing class increasing from year to year from that date, the present depleted condition of the rookeries has resulted directly therefrom."

By Mr. CARTER:

In these affidavits I have given conclusions formed by me as to the decrease of seals in former periods of which I knew nothing by direct observation. The evidence I had of the extent of the herd at this period consisted in the condition of the ground immediately in the rear of the breeding grounds. After the seals occupy a certain area for a certain length of time the rocks become much worn, smooth, shining, and glisten in the sun, and the vegetation is entirely scoured off, and is invariably replaced, when the area is abandoned, by a totally different kind of vegetation. That was the chief feature upon which I based my views as to the previous large number of seals. In addition to that was the fact that there were taken, for twenty years prior to 1890, 100,000 skins annually, and any observer of whatever rate of competency would plainly see that 100,000 more skins could not be taken in the year 1891. There were tracts of ground in the rear of the rookeries presenting plain indications that they had been formerly occupied by seals, and those tracts were of very considerable extent. I made measurements of them and mapped them. I made no report of the scientific observations of the Government, but only a regular administrative report. The particular results of my critical examination of the grounds and the maps were reported in the two affidavits.

85 GEORGE R. TINGLE, affirmed and examined as a witness for the defendant, testified as follows:

By Mr. CARTER:

I reside in Washington, D. C., at the present time. I have had some acquaintance with the Pribiloff Islands, in the Behring Sea. My acquaintance with them began in the spring of 1885. I went there that spring in the capacity of Treasury agent in charge of the islands, and I continued to visit them in that capacity four years; 1885, 1886, 1887, and 1888 were my years of service. I went again to the islands in the spring of 1890 in the capacity of superintendent of the defendant's business. My connection with the islands in that capacity ceased at the close of the business season of 1893. While Treasury agent I visited

both islands. The condition of the herds was very fine during the season of 1885 and for some years afterwards. The Alaska Commercial Company, prior lessee, during those years took the limit of the law, 100,000 seals, during my term of office. There was no difficulty whatever in getting that number in the years 1885-1888.

When I went there again in 1890 the condition of the herd was very much reduced from former years. In 1890, 20,995 were taken by the defendant, that being its first year. The defendant always commenced to take seals the first of June, but the first year after the lease it did not commence as early as that; but that is the time at which the defendant is supposed to take charge of the killing. I don't remember when the first killing was made in June, 1890, but it was the first part of June. In 1891 the condition of the herd, as compared with 1890, was still being reduced. As nearly as I could estimate, in observing the rookeries carefully and frequently, I should think the diminution would amount to perhaps 10 per cent of the herd between 1890 and 1891.

In respect to the condition of the herd in 1892, I should think 86 the same ratio of reduction; 1891 and 1892 were both under the *modus vivendi*. In 1891 there were 60,000 allowed and there were taken some 13,000 in all. The order came after we had been killing for some time and had killed about 6,000 seals. I think that under this *modus vivendi* which had been then adopted we were not to take but 7,000. We had already killed 6,000, and the Treasury agent in charge ruled that we could kill the 7,500 in addition to what we had already taken, so we actually took about 13,500 seals.

In 1890, after taking 20,000 seals I stopped, because I was ordered by the Treasury agent in charge, Mr. Goff, to stop sealing on the 20th of July. There was no reason whatever for stopping—no reason why I should not have gone on and killed more seals.

In 1892 I took 7,500. If it had not been for the limitation to that number, I could have taken of good merchantable seal skins in 1892 30,000 to 35,000, and could have taken that number without detriment to the herd, and could have sold them at a satisfactory price in London, preserving a sufficient number of the older of the young bulls to insure propagation.

In 1893 I took 7,500. I could have taken more without detriment to the herd. If I had killed very closely, I should have been able to take 30,000 skins—making a close kill. What we would call a close kill would be to leave an ample number of old bulls, not taking any old skins at all, because older skins are not merchantable—not desirable.

In reply to the court: I judge I could have taken 30,000 skins.

By Mr. CARTER:

On a close killing 30,000, but on a safer killing from 25,000 to 30,000 is a safe margin for propagating purposes.

In 1893 I did not receive any order to stop taking skins. I 87 knew how many skins the natives would be allowed to take for food before going to the islands through the order of the Treasury Department to their agents. I refer to the instructions of the Treasury Department to the Treasury agent, a copy of which I had. During the prior year I had received some direct notice. That notice was similar to the notice in 1893. The notice in 1891, which I received,

was one which I received at the Department—handed to me—to allow the killing of 60,000. In 1892, when I killed only 7,500, the instructions to the Treasury agent operated, a copy of which was handed to me. They were to the effect that under the *modus vivendi* the Government could take 7,500 for the maintenance of the natives on the seal islands. I am testifying to my understanding of my instructions.

I acted in compliance with those instructions in the years 1892 and 1893, during which the Treasury agent in charge of the islands determined when a killing should take place and the rookeries from which drives should be made. The ordinary mode in which notice was given by Treasury agents concerning the killings and drives was to notify the chief—call him up and ascertain from what rookeries they could make a drive—what rookeries afforded seals in sufficient numbers to constitute a drive—get that information from him, and then give him the order, and he, with his native help, would make the drive. The company's agent, sometimes myself, sometimes the local agent, but most generally the local agent on the island, was notified by either the native chief or the Treasury agent, when he would come down to the company's house for supper or dinner, that a drive would be made during the night from certain rookeries, and that there would be a killing in the morning.

When the actual killing came to take place, the defendant's local agent and myself superintended the selection of such seals as were to be killed or not to be killed. I generally was down there, but the defendant's local agent assorted the skins. We understood, of course, that we were to get this small number of skins, 7,500, and the defendant naturally wanted the very finest skins they could get, and our local agent superintended the assorting and taking of those seals and assisted the natives in clubbing them.

I do not think any of the Treasury agents ever issued any written notices of these drives except one—an officer who was there in the spring of 1892 and 1893. He ran the business in military order, and issued written orders to our local agents. His name was Ainsworth. He issued written orders to our company, and took absolute charge of the business, and the company's agent had hardly anything to do in the matter. He issued these orders to the local agent.

(Two papers are shown the witness.)

I have seen those papers; they are in the handwriting of Lt. Ainsworth, the officer in charge in the winter of 1892 and the spring of 1893.

(Defendant's counsel offered papers in evidence. They were admitted, and marked "Defendant's Exhibits 13 and 14.")

I could not say exactly how many of those orders from Ainsworth I have seen—fifteen or twenty, and twenty-five perhaps. One of those is dated June 1st, the time the defendant is supposed to take charge.

When I was on the islands before, in 1885-1889, the United States Treasury agent always determined when the drives and killings were to take place up to the first of June, at which time the Alaska Commercial Company's killing season commenced, according to statute. From the first of June the lessees of the islands took absolute charge of the killings and the drives. They ordered the drives, communicated to the chiefs their wishes, and the seals were driven and killed, and the whole business was managed and operated under the company's control, until

89 they took their quota, 100,000 seal skins, and after they completed their quota they ceased to exercise that control over the drives, and the Government absolutely controlled the drives after the quota had been obtained until the following spring.

That was so for the time ending with the season of 1889 and in the season of 1890 up to the commencement of the *modus vivendi*, and that included the determination of the rookeries from which the drives were to be made. No notice of these drives was given to the Treasury agents in our killing season. The Treasury agents always knew what was going on. They were always around. They always go on the sealing field, backwards and forwards, if they desire, and the Treasury agents at the conclusion of the killing would count the skins, and counted them in the company's salt house. The Treasury agents took close account of the skins always.

In actually conducting the business of taking seals on these islands the company has a good deal to do to get ready to take fur seals. They have in the first place to furnish houses for the natives to live in and houses for their own people to live in—quite a large number—and keep them in repair thoroughly all the time. They have to have storehouses to contain their supplies that they take to the islands for the maintenance of the natives—several storehouses. They have to have a carpenter's shop and blacksmith shop in all these places for doing their work. They have to have quite a number of salt houses, which are expensive and somewhat scattered; they have to have boats, a large number of boats, called a *beiderrah*, which is an expensive skin boat which is used in lightering goods from the vessel to the shore and from the shore to the vessel, and a great many other small boats.

We have no harbor at either of the islands, and the vessel lies out half a mile on the roadstead, and all goods are lightered by means of  
90 these *beiderrahs*. On St. Paul they are landed at a little wharf which the company has there.

At St. George it is very much more difficult. There are times, days and weeks and months, that you could not get ashore at all with any kind of a boat. We had to watch our chances. Sometimes we got boats smashed up. There is a good deal of danger attending the transfer of goods at these points.

It is not necessary for the company to have salt houses at every killing ground, and they do not. We drive the seals to the village at St. George, close to the village, and have but one salt house there; and when they kill at another place, which is about five miles on the other side of the island, we have a salt house there where they salt the skins. They make the killings there and salt the skins and pack them later on. At St. Paul the salt houses are all at the village, except at Northeast Point, which is about eleven or twelve miles from the village. When the seals are killed at Northeast Point, they are salted there, and the vessel goes there to take the skins off. When I was there last on the islands, I think there were a few less than 200 natives on St. Paul and a few less than 100 on St. George. All the able-bodied men and the young boys are employed in this work of sealing, and they all get a share of the proceeds.

At a killing the seals are clubbed, and as they are clubbed they are hauled out by the natives and laid on their backs, and the half-grown



boys—the stickers, as we call them—the smaller boys stick them in the heart, and then a larger-sized boy comes along and cuts around the head and fins and gets it ready for the skinner. Then the skinner comes along with his big knife and takes the skin off. It is thrown down on the ground and lies there until the killing is entirely over, or they may commence hauling in before the killing is over; they generally do. The teams haul them into the salt house and there they are put on the porch in a pile and the natives come in and pile them up in piles of about fifty, with the fur side down, and when they are all piled and assorted as to sizes as nearly as they can determine by the eye, handling them quickly, the Treasury agent is notified by the company that they are ready to count skins, and he comes down immediately and stands by and the skins are thrown off of this pile by the company's local agent or the natives, and the Treasury agent stands by with his pencil and paper and counts, and the company's agent watches the skins closely to see that they are all skins that he intends to accept; and when the count is completed, the skins are carried in the salt house and salted down in kenches, and there they may remain five or six days, and then they take them out of the kenches, shake the salt off, and they are piled up in what we call a book and some fresh salt put on. They are booked up, where they remain until the killing season is about over. Then we commence bundling those skins, putting two skins together, the flesh sides in, and turn the edges over and bundle them and haul them from there to the warehouse, where they remain until they are ready for shipment; and when we are ready to leave the island and ship the skins that have been taken, the Treasury agent goes to the warehouse and counts the bundles out for the company, and that, I take it, constitutes a delivery of the skins to the company at this warehouse where they are counted for shipment. On that count, when put aboard the ship, the master of the vessel gives a receipt.

The vessel is not a very large one. We use vessels that carry four or five hundred tons. They are sea-going, staunch ships. A vessel makes two trips a season, carrying out supplies and bringing skins back. The first trip is made in May. She leaves San Francisco in May and at such a time as to enable her to arrive on the sealing islands not later than the first of June. She discharges her cargoes at the two islands. Sometimes there is great difficulty in discharging the cargoes. She will come perhaps to St. George Island and, owing to the condition of the weather, she will not be able to discharge any cargo there—can not get ashore—perhaps can not communicate with them at all except by signal; then she will go to St. Paul, which is about 35 or 40 miles further, and there we always have land on one side or the other, either at the east landing or the west side, to discharge goods. We make a lee there at St. Paul until such time as we know we can make a landing at St. George, then we take the vessel over there. If we don't catch the weather right to do some business, perhaps we do not get all our cargo discharged at St. George before we have to get out of there and go to St. Paul again.

We first return to San Francisco, leaving the islands generally the last part of June, sometimes not before the first of July. It is owing to whether she has coal from another station, Dutch Harbor—that is, whether

she carries coal up to the island, before she goes down the first trip. It takes 11, 12, or 13 days for her to go to San Francisco and she starts back the last part of July. About the 20th she will start on her second trip, and on that trip she brings the skins, leaving the seal islands about the 8th or 10th of August. What I have thus stated is a fair description of the taking of fur seals on these islands.

Cross-examination by Mr. MACFARLANE:

The defendant company has other posts in Alaska besides those on the Pribilof Islands. One of these steamers of which I have spoken connects with these other posts during the summer. The steamer that goes to the Pribilof Islands does not take in any other posts in the Territory, excepting the station at Dutch Harbor, which is en route to the seal islands and is the first stopping place where she coals. She stops there

93 for coal to carry her on to the islands when she has not got enough aboard, and possibly to put off some Dutch Harbor goods.

I can not tell how many other posts the defendant has in the Alaska Territory. It has one important post at Wood Island to the eastward. The company deals in other sorts of fur. It deals in all Alaskan furs, and other ships serve these other coasts than the island ships. We take fox skins on the Pribilof Islands; that is one of the privileges the company has by paying the Government well for it, and also paying the natives \$5 a skin; that is all we pay for them; they are not worth \$20 or \$30. I don't know what they are worth in the market this year. Blue fox skins, I should think, are worth \$10 or \$12. I don't know what the selling price is. I am not familiar with it this year. I could tell you in former years. Lieutenant Ainsworth was left on the islands in the fall of 1892 and remained there until the spring of 1893, when he was relieved by Joseph Crowley, the chief Treasury agent. Lieutenant Ainsworth stayed there during the winter until the arrival of Mr. Crowley, the Treasury agent, in the summer. I did not have any altercation with Lieutenant Ainsworth. I did not speak of him after I arrived there, and I did not want to; that is the way I showed my friendliness for him.

During the season of 1893 I did not go about visiting the other posts than those on St. Paul and St. George, except that I went to one of the coast stations, the one that I spoke of, during the summer—Wood Island. I was on the Pribilof Islands all of the time between June and October, excepting the time it took to go to Wood Island and return. I was then gone between 15 and 20 days. I am not sure exactly. That was during the killing season on the islands. I don't remember the date when we made the last killing in 1893.

I did make a careful examination of the records, as I always did every year. I made the only examination that could be made, to go out on the rookeries and observe them closely from different points of obser-  
94 vation and form your judgment as to the condition; that's what I did. I went to all the rookeries. My estimate is that 30,000 seals could have been taken without detriment to the herd in 1893. I heard Mr. Brown's testimony, which, if I remember, was from 20 to 25 thousand. I think a larger number than he states could have been taken. That is a difference in judgment, I suppose. I have had considerable

experience in observing the seal rookeries, and have a pretty good idea of what I could do. I do not think a difference of 5,000 between Mr. Brown's judgment and my own is a material difference. I think it is quite small. I think the two guesses come pretty close together. I am talking about my guess; I am not responsible for Mr. Brown's guess, or anything else he may say.

Redirect examination by Mr. CARTER:

Such things as raids have certainly been known on the islands, and sometimes skins that have been taken have been stolen out of the warehouses, but such skins have never been charged to the quota. What is charged to the quota, in my experience, is only what is counted out to us at the shipment. The skins are accepted by us daily as they are taken and passed into the salt houses; that is where the acceptance takes place. The final account is a verification of the daily count.

Recross examination by Mr. MACFARLANE:

The defendant's steamer that I have spoken of does not carry coal to the Pribilof Islands for the supply of Government navy vessels in the Behring Sea. It is chartered for the sole purpose of supplying the islands, and the coal that is carried up to supply navy vessels is taken on other vessels—half a dozen of them.

95 WILLIAM P. HEPBURN, sworn and examined as a witness for the defendant, testified as follows:

By Mr. CARTER:

I reside in Page County, Iowa, and am at present a Member of Congress. In 1892 I held an official position in the Treasury Department. I became Solicitor of the Treasury on the 16th of April, 1889. I remember some of the incidents of the lease of the right or privilege of taking seals on the Pribilof Islands made in 1890. My recollection is that I had nothing to do with the preparation of the advertisements soliciting bids, but was present when bids were opened, and did participate in determining which was the better bid.

By Mr. MACFARLANE:

The Solicitor of the Treasury is, I think, an attache of the Department of Justice—in other words, a subordinate of the Attorney-General—yet, in many particulars, he is independent of the Attorney-General; his position is not that of an assistant attorney-general.

The COURT. The statute defines his position, I suppose.

Mr. MACFARLANE. I wanted to call attention to the fact that he was the legal adviser of the Secretary.

By Mr. CARTER:

I had something to do with this transaction—participated in the examination of the bids to see which was the better.

Under the direction of the Secretary I drew the contract or lease. I have no knowledge of any communications between intending bidders and the Department in relation to the terms of the bidding, other than those that are documentary. I remember writing a letter upon this subject, and I presume the paper now shown me is a copy of it.

96 Q. I perceive in this letter "I have the honor to say that in section 1962 is found the following—

Mr. MACFARLANE. I object to the reading of this letter. I should like to ask the witness a question at this point.

The COURT. You may do so.

By Mr. MACFARLANE:

Q. You are familiar with section 349 of the Revised Statutes, which provides that there shall be in the Department of Justice a Solicitor of the Treasury and an assistant solicitor are you not?

A. Yes; I presume so.

Q. It is common for the Secretary of the Treasury in many matters that come within his departmental jurisdiction to call upon you for your opinion?

A. Yes.

Q. To advise him as his counsel?

A. Yes.

Q. That is the principal function of the Solicitor is it not?

A. Yes.

Q. This letter to which your attention has been called was an opinion written by you as Solicitor to the Secretary of the Treasury on a question of law which he submitted to you for advice?

A. Undoubtedly.

Mr. MACFARLANE. I object to that letter going in evidence, or to any questions based upon it, on the ground that it is a privileged communication under well settled rules. A communication sent by the Attorney-General to any officer of the Government is a privileged communication. I object to it further as a statement of the witness on a question of law which he says was submitted to him by the Secretary.

The COURT. What is the object of the proof?

Mr. CARTER. I am advised that this witness had something to do with these lettings to determine which was the best, and that he had to fix upon in his mind that the maximum quota was 100,000. I

97 want to get from him the sources from which he derived that.

I can not help thinking that it was because that was the universal understanding. That is what I am trying to get before your honor. He says he does not remember any special conversation. I want to get from him whence it was that he got this understanding that the maximum quota was 100,000.

The COURT. You may ask him the question which you commenced.

By Mr. CARTER:

Q. In this letter it states: "I have the honor to say that in section 1962 is found the following language: 'But the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper.'" This section also limits the maximum number of fur seals that may be killed for their skins upon such islands, in any one year, to 100,000; and the following section fixes the minimum rental at \$50,000 per annum. Do you remember that?

Mr. MACFARLANE. I object to that question on the ground that counsel has no right to read that letter as a part of the question.

(The court sustained the objection, and an exception was then and there taken by the defendant.)

Counsel for the defendant then asked the witness the following questions:

Q. You say you wrote this contract yourself?

A. I did.

Q. I call your attention to this clause of the contract:

“It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said island by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.”

What was your object in putting in that limitation?

(Counsel for the plaintiff objected to that question as incompetent, and that the contract spoke for itself.

Court sustained the objection, and an exception was then and there taken by the defendant.)

Counsel for the defendant then offered to prove by this witness that Secretary of the Treasury Windom had told the witness that the normal and standard quota of seals to be taken was 100,000 for all years, except as otherwise specified.

(Counsel for plaintiff objected to the testimony as incompetent. The court sustained the objection and excluded the testimony, and an exception to such ruling was then and there taken by the defendant, the court stating that it was not necessary to recall the witness for the purpose of putting the question to him, adding “I will exclude the evidence and give the defendant an exception.”)

A. B. NETTLETON sworn and examined as a witness for the defendant.

By Mr. CARTER:

I reside in Washington, D. C. At present I am a general business man. I was Assistant Secretary of the Treasury under President Harrison—during part of his term. My services as such began on the 3d of July, 1890, and continued until November 15, 1892.

Prior to occupying that position I was connected with a company of gentlemen who were intending bidders for a lease of the sealing privileges on the Pribilof Islands, and that company of gentlemen put

99 in a bid. The name of that company was the North American Commercial Company of Illinois, and it was incorporated under the laws of Illinois.

Prior to putting in the bid I had some conversation with those with whom I was acting concerning the interpretation of the advertisement of the Secretary of the Treasury, and I afterwards had some communication with the Secretary of the Treasury touching the same matter. Such communication with the Secretary was almost immediately afterwards. Inquiry having been made in Chicago, I came to Washington within four or five days. There I saw Secretary Windom, and I had some conversation with him concerning this letting.

Q. Will you state what that was?

(Counsel for plaintiff objected to this question as incompetent and immaterial and not apparently bearing in any way upon the issues in this action.

Counsel for defendant stated that he designed to show by this witness what the practice and understanding of the Government was in respect to what the standard quota would be.

The court sustained the objection, and an exception was then and there taken by the defendant.)

ISAAC LIEBES, sworn and examined as a witness on behalf of the defendant:

By Mr. CARTER :

I reside in San Francisco. I am a fur merchant. At present I am a director of the defendant, the North American Commercial Company. At the time the lease was made I was president of the defendant company. During my connection with the company I have had a good knowledge of its affairs and understand all the modes in which its business is transacted generally.

When one of the company's vessels arrives at San Francisco  
100 with skins we then take a force of men into the hold of the ship with the barrels and casks they are to be packed in and salt, and each skin is then put into a cask—about 60 in each cask—and headed up and shipped by rail to New York and thence to London, and sold there at public auction. They have always been consigned to the same person at London, namely, C. M. Lampson & Co., as commission merchants, and the skins are sold at public auction by them. They are the acknowledged largest fur merchants in London and always have received the whole of the American crop and the greater part of the pelagic catch as well.

If the defendant had taken and handled on the Pribilof Islands and transported to San Francisco a larger number of seals than 7,500 in the years 1893 and 1894, say 20,000, the expenses would have been somewhat more than the actual expense incurred, but only to the extent of the payment to the natives of .50 a skin and the additional quantity of salt it would have taken to salt that many more skins, but that would practically be very little. Otherwise the expenses would be just the same whether we take, say, 30,000 or 7,500 skins. The item of salt would be on 30,000 skins probably \$200.

The average cost attending the shipment of skins from San Francisco to London and procuring the sale of them there, covering the whole business, is from eight to nine per cent of the price that they will realize, that is, the expense from the time the skins leave San Francisco until they are sold in London.

There is a commission paid to Messrs. Lampson & Co. of 4 per cent for selling the skins. Then, of course, there are the freight charges overland to New York and from thence to London by steamer. Then there is insurance and other incidental expenses, all of which make from eight to nine per cent of the amount, as I have stated. Nine per cent is an outside figure and will cover the expense. I mean eight or nine per cent of the amount realized upon the sale of the skins. The

101 expense varies with the quantity, as we can ship a larger quantity cheaper proportionately than we can a small quantity. What I have stated is as near as I can get at it. We have a way of calculating



our net profits on the skins, deducting the expenses by counting the shilling as so much in San Francisco. The percentage that I have stated bears out that figuring and the figures say 22 cents net per shilling. In other words, if they brought say 100 shillings in London it would be net \$22 in San Francisco. That is the way the trade has of figuring at it, approximately, as near as they can get at it.

Cross-examination by Mr. MACFARLANE:

I have read the lease between the defendant and the Government. I remember that in it there is a covenant that the defendant will furnish to the native inhabitants of the islands of St. Paul and St. George annually a certain quantity of salmon, a certain quantity of salt, salt barrels, and so on. The defendant performed that covenant during 1893. With the exception of the payment of the rental, per capita, or the royalty and the revenue tax, the defendant performed all the other covenants of the lease during 1893 and 1894. The defendant provided all that was required by the lease to the natives, and everything was furnished to the islands as usual.

I remember the first year of the *modus vivendi*, the season of 1891. During that season the defendant expended certain money on the islands in the performance of the covenants of the lease.

We do not take any other sort of furs on these islands besides seal skins. We get blue-fox skins when the Government allows us to, and we pay to the natives who trap them a certain sum fixed by the Secretary in his annual instructions. I can not remember that in the years 1893 and 1894 the Secretary fixed that sum at five dollars. I do not  
102 know how many of those fox skins we got in 1893 and 1894, but I know the quantity was far less than usual.

The defendant has other stations in Alaska besides those in the Pribilof Islands, but not adjacent to these at all nor dependent on them. Its steamers do not ply about through the season from one to the other. Dutch Harbor is a necessary station in connection with the islands. It is a kind of supply depot for the islands.

By Mr. CARTER:

I was president of the defendant, the North American Company, in 1889 and 1890, and I put in bids on the part of the defendant, and I had interviews with the Secretary of the Treasury with reference to the matter repeatedly. The Secretary was Secretary Windom.

Q. In the course of these interviews was anything said by him bearing upon the matter of the regular quota which the successful bidder would have?

(Counsel for plaintiff objected to this question on the grounds urged to a similar question put to Gen. Nettleton, and that the evidence was not competent in view of the written contract afterwards entered into that the declarations of the Secretary are not binding on the Government in any respect.

The court sustained the objection, and an exception was then and there taken by the defendant.)

103 ALFRED FRASER, sworn and examined as a witness for the defendant:

By Mr. CARTER:

I reside in Brooklyn. By occupation I am a merchant. I know the firm of C. M. Lampson & Co., of London. I am a member of that firm, and I do its business here. My business is the selling of furs as a commission merchant, and has been for many years. The house of Lampson & Co. is by far the largest seller of furs in London, and London is the great market of the world for the receipt and sale of seal skins.

I know what the value of seal skins was during 1891, 1892, 1893, 1894, and 1895.

(Plaintiff's counsel objects to the evidence on the ground that it is offered in support of the defendant's claim for an offset or counterclaim, which is not the subject of a legal offset or counterclaim; on the further ground that the basis or proof for damages is too speculative; and that the evidence is immaterial and incompetent in view of the issues in this case; also that no affirmative judgment can be taken against the United States in this action.)

I heard Mr. Liebes's testimony as to the manner in which the skins are sent to London. When they reach London, they are unpacked and sorted into sizes and qualities, and any inferior skins are sold separate. They are then placed in lots for the examination of the buyers, and sold at auction. I am acquainted with the character of the Alaska or Pribilof Islands catch. It differs in some respects from the pelagic catch. The great majority of pelagic skins are those of females; many of them are injured by having been shot; they are not as carefully flayed and handled as the Alaska skins. The Alaska skins are

104 all males and more carefully handled, and frequently in better condition. Then again the Alaska seals are more heavily furred. The pelagic skins, being mostly female and taken when bearing young, the pelt is extended and consequently the fur is spread over a larger surface and is not so close and valuable.

The Alaska skins therefore bring a larger price. Of late years from 75 to 100 per cent more.

The catch of the summer of 1893 would be sold in the fall of 1893. 7,492 Alaska skins were sold in November, 1893, and averaged gross 108 shillings 6 pence each.

At the same time pelagic skins were sold at an average of 52 shillings. The average price of the catch of 1893 was 108 shillings 6 pence. That is to say, the amount remitted to the defendant company was about \$24 a skin. The selling price was 108 shillings and 6 pence, subject to discount, charges, and commission.

The market is affected by the quantity which is put upon it. An increased quantity frequently results in a decline in value. That is not always so. I think the result has sometimes been the contrary.

In 1891 the average price was 125 shillings; in that year 13,473 skins were sold. In 1892 there were 7,554 skins sold at 125 shillings 4 pence. In 1894 there were 16,030 skins sold at an average of 86 shillings. The decline was probably due, perhaps, to the increased number, but principally to the very serious condition of the trade generally. In 1894

you know we were all poor. In 1895, last year, there were 15,002 skins sold for 81 shillings 9 pence, still less than the price in 1894.

Cross-examination by Mr. MACFARLANE:

The price depends much on the fashionable demand for these skins, which is a capricious element. The price depends on the fashion, demand, weather, and state of trade generally.

105 The market price received for the Alaska take in 1890 was 146 shillings per skin, and in that year there were sold 20,994 skins. I can not state what the price was in 1889, when there were 100,000 skins taken. I think it was eighty odd shillings, but I will not undertake to say positively.

The expenses of sending skins from San Francisco to London are freight, marine insurance, discount, commission. The discount is  $2\frac{1}{2}$  per cent, commission 4 per cent, and the freight and insurance I think about  $2\frac{1}{2}$  per cent. In 1892 the net market price was \$27.50; the gross market price was about \$31. In 1893 the gross market price was \$27.75—that is, 108 shillings and 6 pence.

By Mr. CARTER:

In 1893 Alaska skins were not very eagerly sought for. I may say that the number was so small that it prevented a good many manufacturers and dealers from buying. The reduction in the number of skins lessened the competition for them. It drove a good many buyers out of the market, and those buyers would have to use other skins.

Counsel for the defendant offered in evidence separate report of the American commissioners appointed to make investigations of the facts relative to seal life to the Secretary of State, contained in the American Case in the Fur Seal Arbitration before the Tribunal of Arbitrators, at Paris, vol. 2, American edition, page 311, to and including page 396.

This report, pursuant to the provisions of the following stipulation, is not here inserted:

106 Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA	} Action No. 1.
<i>vs.</i>	
THE NORTH AMERICAN COMMERCIAL COMPANY.	

It is hereby stipulated and agreed that the defendant's bill of exceptions in the above-entitled action, in connection with the writ of error to review the judgment entered therein on June 13, 1896, need not contain the separate report of the American commissioners to the American Government, contained in the American Case before the Arbitration Tribunal at Paris, beginning on page 311 of the American edition, vol. 2, the same not having been marked as an exhibit, but that either party may read or refer to any part thereof upon the hearing of the writ of error in the circuit court of appeals.

Dated New York, July 9, 1896.

WALLACE MACFARLANE,  
U. S. Attorney, Atty. for Plaintiffs.  
CARTER & LEDYARD,  
Attys. for Deft.

107 Counsel for defendant offered in evidence the deposition of J. Stanley-Brown, found on page 10 of Appendix II, to the case of the United States before the Tribunal of Arbitration, at Paris, Vol. III, American edition. The same was admitted, and is as follows:

DISTRICT OF COLUMBIA, *City of Washington, ss:*

JOSEPH STANLEY-BROWN, being duly sworn, deposes and says: I am thirty-six years of age; am a citizen of the United States; reside in Mentor, Ohio; am by profession a geologist, and as such am employed in the United States Geological Survey.

In April, 1891, I was ordered by the honorable the Secretary of the Interior, to whose direction the officers of the Geological Survey are subject, to report to the honorable the Secretary of the Treasury personally, for special service. This I did, and on the 27th of that month I received from the latter a temporary appointment as special agent.

On May 4 I was given instructions to visit the Pribilof Islands, for the purpose of studying the seal life found thereon, with a view to procuring full and accurate information, not as to its present general condition, but also more specifically as to any increase or diminution of the seal herd that makes its home upon the islands. I was further instructed, should I find that change had occurred, to inquire carefully into its relative amount and the causes leading thereto. My duties were in no way connected with the administration of the islands, but I was left free to make as exhaustive and comprehensive an examination of seal life on the islands as the time at my disposal would permit.

In accordance with my instructions I proceeded to San Francisco, and on the 27th day of May sailed for Behring Sea on the United States revenue cutter "Rush." The "Rush" arrived at St. George Island on June 9th, and at St. Paul on the following day. I entered immediately upon

108 the work assigned me, and continued it interruptedly until September 22d, when the "Rush" returned to San Francisco, arriving there on October 2d.

Of the one hundred and thirty days devoted to field investigation, eighty were given to the two islands and fifty at sea, making the voyage to and from San Francisco and in cruising in the vicinity of the Pribilof Islands. This cruising carried me as far north as the island of St. Matthew and of Nunivak, and gave me an opportunity to visit the villages of Akutan, Unalaska, Makushin, Hashega, and Chernofsky, on the Aleutian chain. Thus by field investigation, by cruising, as well as by seeking information from those qualified by their calling to give it, I sought to familiarize myself with the seal question in all its phases.

In the prosecution of my investigations I deemed it desirable to photograph all the rookeries, often from two positions; to make a general topographic survey of both islands on a scale of one mile to the inch, and to prepare detailed charts of the rookeries upon the unusually large scale of 264 feet to the inch. In carrying out this work I examined the entire shore lines of St. Paul and St. George, and there is not an area of a mile square upon either that I have not traversed nor a square hundred feet upon a rookery that I have not repeatedly inspected. The close attention to topographic forms demanded in platting rookeries with so much minuteness, and the care required in selecting the best positions to secure

photographs, inevitably drew me in close contact with seal life and greatly increased my opportunities to study it. There was hardly a day in which I did not have a chance to examine the rookeries and observe rookery life in its varied forms. In all my work upon the islands I was constantly attended by native Aleuts, who assisted in transporting my instruments and other impedimenta. Several of these could speak fair English

Our intimate daily relations, which extended for nearly three months,  
109 were under conditions that offered neither incentive to secrecy nor to deception; and while their general views on and theory of seal life are to be received with caution, they are keen observers of little details, and from them, their friends, and old Russian records on the islands, I received many valuable hints of a natural history and historical character.

This little group of islets, consisting in the order of their magnitude, of St. Paul, St. George, Otter, and Walrus islands, were created in the shallow waters of Bering Sea by volcanic agency. Outpour upon outpour of basaltic lava gave to St. Paul low-lying sea margins, which the waves and ice ground into boulders, pebbles, and sand, and distributed into long reaches of sandy shore at several points. The island lies to-day, except for these minor changes, just as it was created. Cliffs are infrequent, and there are from 20 to 25 miles of alternating areas of sand, rocky ledges, and boulder-covered shores that could be made available, did an expanding herd demand it, for the uses of the seal. About 37 or 38 miles to the southeast lies the second largest of the group, St. George, which, though formed in the same manner as its neighbor, has nevertheless been so modified by orographic movement as to form a strong contrast to it topographically. Bold, towering cliffs are the rule, low-lying shores are rare, and it can boast of only about 6 or 8 miles of really satisfactory rookery space along the entire sea front. As a natural result, St. Paul can and does support a far greater seal population than St. George.

The greatest length of either of these islands would be covered by 12 miles, while 6 would easily span them at their widest part. Otter and Walrus islands, the former about 6 miles to the southward and the latter about 7 miles to the eastward of St. Paul, are mere rocky remnants, and now play no part as breeding grounds for the seal, and it is questionable if they ever did. The islands are far removed from other land  
110 areas, the nearest point on the Aleutian Archipelago lying 200 miles to the southward.

The meteorologic conditions in these latitudes are such, that fogs and mists hang so continuously over the land and water as to make navigation very uncertain and dangerous. So all-enveloping are these vapors that it is often impossible to see the shore a quarter of a mile distant, and so fickle are the fogs and mists that I ascended Bogaslov, the central cone of the island of St. Paul, five times before I could catch a glimpse of the hills immediately surrounding it, and this, too, when each occasion was selected for its promise of clearness. The temperature of the warm season averages about 45° or 50°, and, though no trees grow upon the islands, the excessive humidity is so favorable for grasses, flowers, and other herbage, that they grow with a rapidity and flourish with a luxuriance difficult to realize and unknown in the north temperate zone.

Many explanations have been offered of the seals having selected these islands as their home. My observation does not enable me to state their

reason for having done so, but the fact remains substantiated by my experience and that of all others of whom inquiries were made, that these remote, rock-bound, fog-drenched islands are the chosen resort of the fur-bearing seals (*Callorhinus ursinus*). The more jagged and irregular the lava fragments that cover the shore, the more continuous the drenching they receive from the moisture-laden atmosphere, the better the seals seem to like it. Neither from personal observation, from inquiries of the natives on the islands and the villages of the Aleutian chain, nor from questioning seafaring men, who, by opportunity for observation and general intelligence, were competent to inform me, could I learn of any other land area ever having been selected by this herd of fur seal for its residence and for the perpetuation of its species.

I learned that fur seals of the species *Callorhinus ursinus* do  
111 breed and haul out at the Commander Islands and Robbin Reef, but the statements made to me were unanimous that they are a separate herd, the pelt of which is readily distinguished from that of the Pribilof herd, and that the two herds do not intermingle.

As a result of the volcanic origin of the islands their shores are, with few exceptions, either made up of the boulder-strewn laval edges or covered by jagged fragments of basalt of all sizes, the sharp edges of which are only slightly worn by the seals' flippers or more completely rounded by the waves at the water's edge. There are a few true sand beaches; occasional level areas are found at the back of the rookeries, and in some places between the rock masses, comparatively smooth interspaces occur, but even the level portions referred to must be reached by crossing a wide belt of boulders of all sizes that have been pushed landward by the waves and by the ice which annually surrounds the islands. It is upon such shores that the seal "rookeries" are located. Of the ruggedness of these shores or of the regularity and confusion of the lava blocks that cover them it is difficult to form a picture, but it is in a measure indicated in the accompanying photographs.

A rookery thus presents two distinct features structurally, while from the standpoint of seal life thereon there are again the two well-recognized divisions of "breeding grounds" and "hauling grounds." The word "rookery" is a general one and includes the specific terms "breeding grounds" and "hauling grounds."

In general and by preference the more rocky areas are selected by the females as "breeding grounds," and here, of course, the breeding bulls are found; while the young immature males or bachelor seals are relegated to the adjacent sandy shores or smoother spaces at the rear of the rookeries for their "hauling grounds."

112 Over these masses of rock the females scramble and stumble during the entire breeding season, and in maintain'g the control of his household the bull dashes here and there, striking repeatedly against the sharp edges of the rocks with a force that to the onlooker would seem to threaten his life.

At no time during 1891 was there other than the greatest care exercised in protecting the breeding grounds from intrusion or molestation, precautions being taken that to a novice would seem excessive; nor could I find by the most diligent inquiry among the natives that there had been



any deviation from these rules since the American occupancy of the islands, nor during that time had there been the killing of a female seal save by the rarest accident.

The "hauling grounds" of the young bachelors, which is usually somewhat removed from the "breeding grounds," is the only portion of a rookery upon which any intrusion is permitted.

An inspection of the general map of St. Paul Island will show that there are now existing thereon practically ten rookeries, some of which, however, coalesce.

These rookeries are: North'est Point, Little Polavina, Big Polavina, Lukannon, Ketavie, Reef, Garbotch, Lagoon, Tolstoi, Zapadnie.

Upon the island of St. George it will be seen that there are five rookeries—Great East, Little East, North, Starry Arteel, Zapadnie.

Shoreward the limit of a breeding rookery is sometimes defined by topographic conditions, as in the case of a bluff, but the seal life present in any one year upon the breeding ground is the true standard for the determination of boundaries. Upon the large-scale charts, A, B, C, D, E, F, G, H, I, J, K, will be seen the approximate areas occupied as "breeding grounds" in 1891, as observed by me, while the areas for certain previous years have been indicated by other observers.

The area of a "hauling ground" is an everchanging quantity, 113 but the locality at which bachelor seals hauled in 1891 and the approximate areas hauled over is also indicated on the charts.

The seals which make their home upon the Pribilof Islands are readily thrown into five general groups: (1) the breeding males or bulls, (2) the breeding females, (3) the immature males or bachelor seals, (4) virgin females, and (5) the pups. Each has its own time of arrival, each its separate career on the islands, and each its season for the annual expedition into the Pacific Ocean.

The records kept upon the islands concerning the arrival of seals show that in the last days of April or first days of May the bulls begin to make their appearance. The first arrival on St. Paul in 1871 was on May 4; in 1890, on April 26. In the year 1876 the unusual fact appears in the record that a large number of bulls were in the waters about the island on February 15. About one month after the arrival of the bulls, or in the first days of June, the females begin to appear. In 1891 the maximum of daily arrivals was reached from June 24 to 28. Between the arrivals of bulls and females, but rather closely following the bulls, come the bachelors, those immature young males which furnish the skins of commerce. The natives, after the long winter, are eager for fresh meat, and it is usually possible to make drives of them for food not later than May 15, and sometimes from a week to ten days earlier.

The time of the arrival of the virgin cows is not easy to determine, but from my observation my present conclusion is that they arrive with the cows and for a while spend their time in the water or on the land adjacent to the rookery margin.

The birth of the pups is nearly synchronous with the arrival of the mothers.

Upon reaching the islands in early June I found that the bulls, in accordance with their habit, had not only preempted their claims upon the breeding grounds, but were well established in their possession.

114 Being polygamous, each bull seeks to gather around himself as many cows as possible to form what has appropriately been called his "harem." Here and there at wide intervals a few cows were already to be seen beside them, but no time during the season were the rookeries free from the contention of the males that sought by coaxing or theft to procure females with which to increase their harems, and from the time I landed until the close of July no master of a harem abandoned his position to procure either food or water. These bulls during the breeding season were the embodiment of ferocity, and at no time did I see one of them that would not instantly and fiercely resist any encroachment upon his territory, whether it were made by his neighbor or by man. At no time would a bull fail to scramble across the rocks or course rapidly around his harem to coerce a rebellious or deserting consort. The creature that can exist without nourishment for eighty or ninety days while subject to the greatest physical exertion and strain must possess a vitality unsurpassed by any other member of the animal kingdom, and must bequeath to its offspring even in their immaturity an unusual capacity for endurance.

From my observation as to the vitality of male seals, I believe that it is difficult to determine with absolute accuracy the capacity of the bull for rookery service, as it must in large measure depend upon the personal equation of the individual; but I am nevertheless of the opinion that a conservative estimate would be that he could serve without difficulty at least one cow per day during his stay upon the rookery. Possibly the best results would not be achieved thereby, but this capacity, taken in connection with the fact that young males persistently seek their opportunities upon the rookery margins and at the water's edge during the entire season, leaves no doubt in my mind that no breeding female leaves the island unimpregnated. This view is further borne out by the fact that in the first days of rookery life I repeatedly counted groups of female seals by the side of each of which lay her pup.

115 The number of females which a bull is able to gather around him to form his harem, depending as it does in some measure upon topographic conditions, may be represented by the extremes of one and seventy-five. The average number of last year was about twenty or twenty-five. Unusually large harems were infrequent.

The abundance of male life for service upon the rookeries was evidenced by the number of young bulls which continually sought lodgment upon the breeding grounds.

It is highly improbable that the rookeries have ever sustained any injury from insufficient service on the part of the males, for any male that did not possess sufficient vitality for sustained potency would inevitably be deprived of his harem by either his neighbor or some lusty young aspirant, and this dispossession would be rendered more certain by the disloyalty of his consorts.

Pelagic coition I believe to be impossible. The process upon land by reason of the formation of the genital organs is that of a mammal; is violent in character, and consumes from five to eight minutes. The relative sizes of the male and female are so disproportionate that coitus in the water would inevitably submerge the female and require that she remain under water longer than would be possible for such an amphibian.

I have sat upon the cliffs for hours and watched seals beneath me play in the clear water. It is true that many of their antics might be mistaken for copulation by a careless observer, and this may have given rise to the theory of pelagic coition. I have never seen a case of the many observed which upon the facts could properly be so construed.

When the season is over the bulls, now reduced in weight, find their way to sea for recuperation.

My observation has been that the female seal, prompted by the maternal instinct, lands, chooses by preference the rocky shore, and is permitted a certain amount of freedom in going her way until  
116 just the place most to her liking is found, but when once parturition is completed she then, being of necessity tied to the spot, becomes subject to the control of the male, which control is exercised with vigor. Should the point of access to a rookery be through a break in the cliff that offers only a steep incline, the chances are that the bulls located near will be favored with large harems.

From the frequency with which I saw females select a flat stone, over the edge of which the posterior portion of the body would hang previous to delivery, suggests an explanation of why the rocky margins are preferred to the sandy shores. It is not possible to determine how soon after the arrival of the mother the pup is born, for she may have been in the water adjacent to the island several days before finding it necessary to come ashore. But the accouchment follows quickly upon the landing. Very soon thereafter the females receive the males, and there is no doubt that the master of the harem has knowledge of the female's condition as regards pregnancy, for while some of his consorts, the latest arrivals, are jealously guarded, others are permitted greater freedom.

For the first few days and possibly for a week or even ten days the female is able to nourish her young offspring, but she is soon compelled to seek the sea for food that her voracious young feeder may be properly nourished, and this seems to be permitted on the part of the male, even though under protestation. The whole physical economy of the seal seems to be arranged for alternate feasting and fasting, and it is probable that in the early days of its life the young seal might be amply nourished by such milk as its mother might be able to furnish without herself resorting to the sea for food.

The female gives birth to but a single pup. The labor is of short duration, and seems not to produce great pain. In the first weeks of its life the pup does not seem to recognize its mother, but the  
117 latter will recognize and select her offspring among hundreds.

The young on being born have all the appearance of pups of a Newfoundland dog with flippers. On emerging from their warm resting place into the chill air they utter a plaintive bleat not unlike that of a young lamb. The mother fondles them with many demonstrations of affection, and they begin nursing soon after birth.

Were not the seals, in their organs of reproduction as well as in all the incidents of procreation, essentially land animals, the fact that the placenta remains attached to the pup by the umbilical cord for twenty-four hours or even more after birth would show the impossibility of aquatic birth. I have seen pups dragging the caul over the ground on the third day after birth. Even could the pup stand the buffeting of the

waves, it would not survive such an anchor. No pup could be born in the water and live. Doubtless the habits of the sea otter have become confused with those of the fur seal. The pup during the first months of its life is not amphibious. It does not even use its flippers as the maturer seals. It moves in a gait more like going on "all fours," while the adult seal moves by drawing up the hind quarters as a whole and then throwing itself forward its own length.

The young seals require the nourishing care of their mother for at least four months, and pups have been killed on the island late in November, the stomachs of which were filled with milk. By the middle of July the mothers were going constantly back and forth to sea; the pups, left more to themselves, collected in groups—"pods," as they are called—and by the last of July they worked their way down to the shore and began learning to swim.

The pups are afraid of the water. They have to learn to swim by repeated effort, and even when able to maintain themselves in the quiet waters will rush in frantic and ludicrous haste away from an  
118 approaching wave. I have taken pups two or three weeks old and carried them out into still water, and they awkwardly, but in terror, rapidly floundered toward the shore, although they could have escaped me by going in the other direction. In three trials, paddling in all about 60 feet, the pups became so exhausted that they would have been drowned had I not rescued them. If the pups, when collected in groups or pods near the shore, were to be overtaken by even a moderate surf, they would be drowned, and such accidents to them do occur on the island before they have entirely mastered the art of swimming.

The latter steps in the history of rookery life all facilitate, if indeed they do not play, an important part in the disorganization of the harem system. Just as soon as the pup has reached the age of forming pods and making little excursions hither and thither, the bull's authority diminishes, for his control over the mother is lost in the presence of the bleat of the hungry offspring.

Up to the 20th of July the breeding grounds present a compact, orderly arrangement of harems, but under the combined influence of the completion of the serving of the females and the wandering of the pups disintegration begun at that date rapidly progresses. It is at this time that the virgin cows of 2 years of age, or not older than 3, mingle more freely with the females and probably enter into the maternal ranks, for the unsuccessful males and maturer bachelors, no longer deterred by the old males, also freely wander over the breeding grounds.

While the breeding grounds have been left undisturbed to their own career, the hauling grounds have alternately been the scene of drives for the purpose of killing. The immature bachelors form the bulk of the seals that haul out upon these grounds, and of them only the 3 and 4 year olds are taken for their skins.

The only seals killed for their pelts are those immature males that haul  
119 out upon the hauling grounds remote from the breeding grounds, and the handling of them causes no disturbance to the breeding females. The number of bachelors permitted to be taken in any one season is entirely within the control of the Treasury Department,

which control has been exercised during the past two years for the enormous reduction of the annual quota.

There are certain physical as well as historical sources of information upon the island from which the relations from the present to the past condition of the rockeries can be very clearly made out.

I. Not only upon but immediately to the rear of the area at present occupied by the breeding seals occur fragments of basalt whose angles have been rounded and polished by the flippers of the seals. Among these latter rocks grass is found growing to an extent proportionate to their distances from the present breeding ground, and further the soil shows no recent disturbance by the seals. This rounding of the boulders of the abandoned areas was not due to the impingement of sand grass driven by the wind. No geologist would be willing to risk his reputation by asserting that this rounding came from any such agency. The distinction between the result of sand grass action and seals' flippers is very marked.

II. A careful examination among the roots of the grass will often show the former presence of seal by the peculiar appearance of the soil, due to the excrements of the seal and the occurrence of a thin mat of seal hair. The attention of Dr. George M. Dawson was called to such a felt of hair upon the summit of Hutchinson Hill, and both he and Dr. C. Hart Merriam collected specimens of it from among the grass roots at that locality.

III. At the rear of the rockeries there is usually an area of mixed vegetation—an area the boundary of which is sharply defined, and between which and the present breeding grounds occurs a zone of grass of only a single variety.

120 In the immediate vicinity of the present breeding ground only scanty bunches are to be seen. These gradually coalesce as the line of mixed vegetation is approached. The explanation of this is that the seals were formerly so abundant as to destroy the normal mixed vegetation at the rear of the breeding grounds, and that the decrease of the seals has been followed by the encroachment of the uniform variety of grass.

IV. The statements made to me by competent observers who have lived upon the islands for years all agree that the shrinkage in the breeding area has been rapid during the past five or six years.

V. After observing the habits of seals for a season, I unhesitatingly assert that to satisfactorily account for the disturbance to vegetable life over areas whose extent is visible even to the most careless and prejudiced of observers, would require the presence of from two to three times the amount of seal life which is now to be found upon the islands. That there has been enormous decrease in the seals there can be no question.

In studying the causes of diminution of seal life there were found a variety of actual and possible sources of destruction which are affected in varying degrees. Fortunately the most important of these sources were directly under my observation, and the following facts presented themselves for consideration:

I. The restrictions upon the molestation of the breeding grounds and upon the killing of females has been imperative both on the part of the

Government and lessees since the American ownership of the islands, so that in taking of seals no injury could possibly have occurred to the females and bulls found thereon.

121 II. The seal being polygamous in habit, each male being able to provide for a harem averaging twenty or thirty members, and the proportion of male to female born being equal, there must inevitably be left a reserve of young immature males, the death of a certain proportion of which could not in any way affect the annual supply coming from the breeding grounds. These conditions existing, the Government has permitted the taking, with three exceptions, up to 1890 of a quota of about 100,000 of these young male seals annually. When the abundance of seal life, as evidenced by the areas formerly occupied by seals is considered, I do not believe that this could account for or play any appreciable part in the diminution of the herd.

III. The statistics which I have examined, as well as all the inquiries made, show that in the raids upon the rookeries themselves by marauders the loss of seal life has been too unimportant to play any part in the destruction of the breeding grounds. The inhospitable shores, the exposure of the islands to surf, the unfavorable climatic conditions, as well as the presence of the natives and white men, will always prevent raids upon the islands from ever being frequent or effective.

IV. For some years past the natives were permitted to kill in the fall a few thousand male pups for food. Such killing has been prohibited. It is not apparent how the killing of male pups could have decreased the number of females on the breeding grounds.

V. From my knowledge of the vitality of seals I do not believe any injury ever occurred to the reproductive powers of the male seals from redriving that would retard the increase of the herd, and that the driving of 1890 necessary to secure about 22,000 skins could not have caused nor played any important part in the decrease that was apparent on every hand last year.

122 VI. From my observations and my inquiries of the natives under conditions which were calculated to elicit only truthful replies, I ascertained that there had been no change save for the better in the methods of driving or the handling of seals; that salt houses had been established at the more distant rookeries; that boats, horses, mules and wagons had been employed to transport the skins; that by these improvements the length of the drives had been materially lessened, and that the time for taking the quota had been reduced from the Russian killing season of three or four months to about 30 days, thereby causing the minimum of disturbance even to the hauling grounds.

VII. I ascertained by questioning those who had had years of continuous experience with the seal that up to the year 1882 there was an annual expansion of the boundaries of the breeding grounds; that this was followed by a period of stagnation, which, in turn, was followed by a marked decadence from about 1885-86 down to the present time.

VIII. In the latter part of July, 1891, my attention was called to a source of waste, the efficiency of which was most startlingly illustrated. In my conversations with the natives I had learned that dead pups had been seen upon the rookeries in the past few years in such numbers as to cause much concern. By the middle of July they pointed out to me here



and there dead pups and others so weak and emaciated that their death was but a matter of a few days.

By the time the British commissioners arrived the dead pups were in sufficient abundance to attract their attention, and they are, I believe, under the impression that they first discovered them. I procured a number of these pups, and Dr. Akerly, at my request, made autopsies, not only at the village, but later on upon the rookeries themselves.

123 The lungs of these dead pups floated in water. There was no organic disease of heart, liver, lungs, stomach, or alimentary canal. In the latter there was but little and often no fecal matter, and the stomach was entirely empty. Pups in the last stage of emaciation were seen by me upon the rookeries, and their condition as well as that of the dead ones, left no room to doubt that their death was caused by starvation. By the latter part of August deaths were rare, the mortality having practically ceased. An examination of the warning lists of the combined fleets of British and American cruisers will show that before the middle of August the last sealing schooner was sent out of Behring Sea. These vessels had entered the sea about July 1st, and had done much effective work by July 15th. The mortality among the pups and its cessation is synchronous with the sealing fleet's arrival and departure from Behring Sea.

There are several of the rookeries upon which level areas are so disposed as to be seen by the eye at a glance. In September, Dr. Akerly and I walked directly across the rookery of Tolstoi, St. Paul, and in addition to the dead pups in sight they lay in groups of from three to a dozen among the obscuring rocks on the hillside. From a careful examination of every rookery upon the two islands made by me in August and September, I placed the minimum estimate of the dead pups to be 15,000, and that some number between that and 30,000 would represent more nearly a true statement of the facts.

Upon examining the Behring Sea catch for 1891, as based upon the records of the Victoria custom-house, I ascertained that nearly 30,000 seals had been taken by the British fleet alone in Behring Sea during the summer of 1891. When there is added to this the catch of the American vessels, the dead pups upon the rookeries, and allowances made for those

that are killed and not recovered, we have a catch which will not  
124 only nearly reach in numbers the quota of male seals allowed to be taken upon the islands in years gone by, but we have a catch in the securing of which destruction has fallen most heavily upon the producing females. This is borne out by a further fact. The young bachelor seals can lie idly on the hauling grounds and through the peculiarities of their physical economy sustaining life with a small supply of food, but the cows must range the ocean in search of nourishment that they may meet the demands made upon them by their young. That seals go a great distance from the islands I know from personal observation, for we saw them 120 miles to the northward of the island on the way to Nunivak. That the females outnumber the males ten to one is well known, otherwise the hauling grounds would present such an array of killable seal that there would be no necessity for the Government to suspend the annual quota. It inevitably follows that the females are the class most preyed upon in Behring Sea. No class of animals which

bring forth but a single offspring annually can long sustain itself against the destruction of the producers.

As a result of my investigations I believe that the destruction of females was carried to the point in about 1885 where the birth rate could not keep up the necessary supply of mothers, and that the equilibrium being once destroyed and the drain upon the producing class increasing from year to year from that date the present depleted condition of the rookeries has resulted directly therefrom.

JOSEPH STANLEY-BROWN.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 9th day of May, 1892.

[L. S.]

SEVELLON A. BROWN.

125 Counsel for defendant offered in evidence the advertisement of the Government for the first lease—that is, the lease from 1870 to 1890, as contained in Executive Document No. 108, House of Representatives, Forty-first Congress, third session, page 4, which was admitted, and which is as follows:

TREASURY DEPARTMENT, *July 8, 1870.*

The Secretary of the Treasury will receive sealed proposals until 12 o'clock noon, Wednesday, the 20th of July instant, for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty years from the 1st day of May, 1870, agreeably to the provisions of an act approved July 1, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska."

In addition to the specific terms prescribed in the act, the successful bidder will be required to provide a suitable building for a public school on each island and to pay the expense of maintaining a school therein for not less than eight months in each year, as may be required by the Secretary of the Treasury.

Also, to pay to the natives of the islands for the labor performed by them such compensation as may be necessary for their proper support, under regulations to be prescribed by the Secretary of the Treasury.

GEO. S. BOUTWELL,

*Secretary.*

Counsel for defendant offered in evidence the bids made under that advertisement from the same Executive Document, pages 5 and 9, which were admitted, and copies of which are as follows:

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TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY, *July 20, 1870.*

Memorandum in reference to bids for the exclusive right to take fur seals upon the islands of St. Paul and St. George, read before the persons present at the opening of the bids, at 12 o'clock noon, July 20, 1870.

First. The successful bidder will be required to deposit security within three days to the amount of fifty thousand dollars, in lawful money, or bonds of the United States, for the due execution of a contract, agreeably to "An act to prevent the extermination of fur-bearing animals in Alaska," approved July 1, 1870.

Second. It being apparent from the language employed in the act aforesaid that it was the intention of Congress to give a preference to the Alaska Commercial Company in the award of the contract, I think it proper to state, before the bids are opened, that the contract will be awarded to said company if their proposal shall not be more than ten per cent. below that of the highest bidder.

Third. No bid will be accepted unless made by a responsible party, acquainted with the business, or skilled in kindred pursuits to such an extent as to render it probable that the contract will be so executed as to secure the results contemplated by the law.

In accordance with the terms of the above advertisement, which was published in the principal newspapers of the country, including those of San Francisco, and after reading the above memorandum, the Secretary of the Treasury publicly opened the proposals in the following order:

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[1.]

NORRISTOWN, PENNSYLVANIA, *July 18, 1870.*

SIR: In accordance with your advertisement of the 8th of the present month, we offer to lease the exclusive right to take fur seals in Alaska and will pay therefor an annual rent of \$75,500, in accordance with the act of Congress referred to.

Truly, yours, &c.,

L. E. MORGAN & Co.

Hon. GEO. S. BOUTWELL,

*Secretary of the Treasury, Washington, D. C.*

[2.]

NO. 5 WALL STREET, NEW YORK, *July 19, 1870.*

SIR: I will pay an annual rental for the lease of the islands of St. Paul and St. George, Alaska, for the exclusive right to take the fur seals therefrom, under the conditions named in your advertisement of July 8, 1870, and the act of Congress therein referred to, the sum of \$96,000 per annum.

J. W. RAYMOND,  
*Of San Francisco.*

Hon. G. S. BOUTWELL,

*Secretary of the Treasury, &c., Washington, D. C.*

Present address, No. 5 Wall street, New York, care of Puleston, Raymond & Co.

[3.]

PHILADELPHIA, *July 19, 1870.*

In accordance with the inclosed advertisement, we offer for the lease of said privileges, as contained in the act of Congress referred to, the sum of \$105,500 annual rent.

Respectfully, yours, &c.,

T. ADAMS & SON,  
*No. 833 N. Broad Street, Philadelphia, Pennsylvania.*

Hon. G. S. BOUTWELL,

*Secretary of the Treasury, Washington, D. C.*

JULY 20, 1870.

The undersigned, an American citizen, residing at the city of San Francisco, in the State of California, and representing and being duly authorized to act in this behalf for Fischel & Co., of which firm he is a member, the American-Russian Commercial Company, and Taylor & Bendell, all of said city and State, and all the members connected with and composing the said companies and firms being American citizens, and being proper and responsible parties, make the following proposals for a lease of the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, in the Territory of Alaska, for a term of twenty years from the 1st day of May, 1870, in accordance with the terms and provisions of the act of Congress entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July 1, 1870, and of the notice for proposals for said lease issued by the Secretary of the Treasury, to wit:

1. The said companies and firms propose to pay to the United States, over and above the annual rental of \$50,000, and the revenue tax or duty of \$2 on each fur-seal skin taken and shipped from said islands, provided in the sixth section of said act, a bonus of \$100,000, to be paid in annual installments of \$5,000 for each and every year of said lease.

2. A bonus of  $62\frac{1}{2}$  cents apiece on the skins that shall be taken and shipped of such fur seals as may be killed under the provisions of the third section of said act.

[NOTE.—Under this proposal, if 100,000 skins are taken, under the regulations of the Secretary of the Treasury, the bonus will amount to \$62,500 per annum, or \$1,250,000 during the lease.]

3. For such oil as may be made from the carcasses of the seals killed, the sum of 55 cents per gallon.

[NOTE.—Each carcass is estimated to furnish two gallons of oil. If 100,000 animals should be killed per annum; and the oil obtained from all of them, the total amount of revenue to the Government from this item would be \$110,000 per annum, or \$2,200,000 for the term of the lease.]

4. In addition to the foregoing proposals, the said companies and firms propose to build suitable schoolhouses, and to support and maintain proper schools for the education of the natives in each of said islands, and to erect a church house on the island of St. Paul, and to support a priest thereat, under the authority of the bishop of the Russian Greek Church, located either at Sitka or San Francisco.

Should the foregoing proposals be accepted, the said companies and firms are ready to give bond immediately in such sum as may be required by the Secretary of the Treasury, conditioned that they will promptly enter into the lease, make the deposit, give bonds, and comply in all respects with the provisions of the law and the requirements of the Secretary of the Treasury.

LOUIS GOLDSTONE.

[5.]

WASHINGTON, D. C., July 20, 1870.

SIR: I, C. M. Lockwood, of the State of Oregon, desirous of securing the benefits and rights offered by the act of Congress entitled "An act

to prevent the extermination of fur-bearing animals in Alaska," approved July 1, 1870, do by these presents offer as an annual rental the sum of \$127,000 for the enjoyment of the said rights and privileges secured by the act of Congress above referred to and for the length of time therein mentioned.

Very respectfully, your obedient servant,

C. M. LOCKWOOD.

Hon. GEORGE S. BOUTWELL,  
*Secretary of the Treasury.*

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[6.]

WASHINGTON, D. C., July 20, 1870.

SIR: The undersigned, a citizen of the United States, desiring to avail himself of the privileges and benefits of the act of Congress entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July 1, 1870, do hereby offer the sum of \$156,000 annual rental for the enjoyment of the rights and privileges secured by the act of Congress above referred to and for the term therein mentioned.

Very respectfully, your obedient servant,

JOHN BARNETT,  
Per L. L. BLAKE.

Hon. GEORGE S. BOUTWELL,  
*Attorney in Fact,*  
*Secretary of the Treasury of the United States.*

(The above bid was accompanied by a power of attorney.)

[7.]

WASHINGTON, July 19, 1870.

I propose, for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty years from the 1st day of May, 1870, agreeably to the provisions of an act approved 1st day of July, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska," that I will comply with all the provisions of said act, and do and perform all of its conditions imposed upon the lessee. That in complying with said conditions I will yield to a liberal construction of the same for the benefit of the Government, for the interest and welfare of the Indians, and the preservation of the seals. That I will pay to the Government annually the sum of \$163,000. That I will immediately deposit with the Government the bonds required by the

Secretary of the Treasury; and that I will provide a suitable  
131 building for a public school on each island, and pay the expenses of maintaining a school thereon for not less than eight months in each year, as may be required by the Secretary of the Treasury. Also, that I will pay the natives of the island for the labor performed by them such compensation as may be necessary for their support, under regulations to be prescribed by the Secretary of the Treasury. That I will deposit all such securities and execute such bonds, with good and sufficient sureties, to the satisfaction of the Government as the Secretary of the Treasury shall dictate or require, and do all things that he, said

Secretary of the Treasury, shall require, whether mentioned in this proposal or not.

S. CLINTON HASTINGS.

Hon GEORGE S. BOUTWELL,  
*Secretary of the Treasury of the United States.*

[8.]

OFFICE OF WETMORE, CRYDER & COMPANY,  
*73 and 74 South Street, New York, July 19, 1870.*

SIR: In accordance with the terms of your advertisement, dated Treasury Department, July 8, 1870, for "Proposals for the exclusive right to take fur seals in Alaska," according to the act of Congress approved July 1, 1870, therein referred to, the undersigned offers the sum of \$76,550 per annum for the said exclusive lease.

JNO. H. BRADFORD.

Hon. GEORGE S. BOUTWELL,  
*Secretary of the Treasury, Washington, D. C.*

[9.]

WASHINGTON, D. C., *July 20, 1870.*

SIR: The Alaska Commercial Company makes the following proposal for the privilege of taking fur seals in Alaska in accordance with the provisions of the act approved July 1, 1870, entitled "An act to  
132 prevent the extermination of fur-bearing animals in Alaska," and pursuant to the terms of the advertisement of the Secretary of the Treasury hereto attached (advertisement of July 8).

Said company will pay to the United States a rent of \$65,000 per annum for twenty years from May 1, 1870, and in addition thereto will furnish to the inhabitants of the islands of St. Paul and St. George, in Alaska, free of charge, each year, 25,000 dried salmon, 60 cords of firewood, and a sufficient quantity of salt and number of barrels for preserving a necessary supply of meat. Also, in order that the inhabitants of the Aleutian Islands may be provided with such necessities as they have been accustomed to receive, without expense, said company agrees to supply to these inhabitants each year 200 barrels of oil, and a sufficient number of seal skins to supply them with boats, and a sufficient quantity of sinews and membrane to supply them with waterproof garments free of charge.

Said company also agrees to maintain the schools at said islands, as required by the Secretary of the Treasury, and agrees to comply strictly with all the requirements of the law and regulations of the Treasury Department in the premises, and give approved security for its undertaking in this behalf. And said company hereby offers, in the event that any other party, who within the true intent and meaning of said act is "a proper and responsible party," shall, under said advertisement, offer, in good faith, a greater amount for said privilege than the whole amount offered by said company, as above stated, to pay to the United States the



full amount offered by such party, and comply with the laws and regulations, and give all the security required.

JNO. F. MILLER,  
*President Alaska Commercial Company.*

HON. GEORGE S. BOUTWELL,  
*Secretary of the Treasury.*

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[10.]

WASHINGTON, *July 20, 1870.*

The undersigned, Talbot T. Fowler, who resides in Washington, District of Columbia, proposes to lease from the Government of the United States of America, through the Secretary of the Treasury, the islands of St. Paul and St. George, for the exclusive privilege and right to take fur seals thereon for the term of twenty years, from the 1st day of May, A. D. 1870, for the annual sum of \$77,000.

This proposal is made with the full knowledge of the act approved July 1, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska."

And the undersigned is willing and ready to comply with such regulations as may be prescribed by the Secretary of the Treasury in giving bond and security for faithful compliance with said act of July 1, 1870, and such regulations as the Secretary of the Treasury may make relative to public schools on said islands, and the payment of wages to the inhabitants or natives of St. George or St. Paul.

TALBOT T. FOWLER.

[11.]

WASHINGTON, D. C., *July 20, 1870.*

The undersigned, S. K. Hannigan, residing in Terre Haute, Indiana, proposes to lease from the Secretary of the Treasury of the United States of America the islands of St. Paul and St. George, Alaska, for the purpose of taking fur seals, for the period of twenty years from the 1st of May, A. D. 1870, for the annual sum of \$73,000.

This proposal is made with the view of complying specifically with the provisions of an act approved July 1, A. D. 1870, entitled "An act to prevent the extermination for fur-bearing animals in Alaska,"

134 and such regulations as the honorable Secretary of the Treasury may make relative to public schools and the payment of wages to natives of said islands.

Respectfully submitted.

SELLMAN K. HANNIGAN.

[12.]

WASHINGTON, D. C., *May 20, 1870.*

The undersigned, Jno. M. Davidson, who resides at 411 Twelfth street, Washington, proposes to lease from the Secretary of the Treasury of the United States of America the islands of St. Paul and St. George, for the exclusive right and privilege to take fur seals on said islands, for the term of twenty years from the 1st of May, A. D. 1870, for the

annual sum of \$87,000. This proposal is made with full knowledge and good intent to carry out the provisions of an act approved July 1, A. D. 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska," and such regulations as may be made by the honorable Secretary of the Treasury relative to public schools and the payment of wages to the inhabitants or natives of said islands of St. Paul and St. George, Alaska.

JNO. M. DAVIDSON,  
*411 Twelfth Street, Washington, D. C.*

[13.]

PHILADELPHIA, *July 19, 1870.*

The undersigned, Thomas W. Sweney, whose residence and post-office address is No. 716 Walnut street, Philadelphia, State of Pennsylvania, proposes to lease from the Government of the United States, through the Secretary of the Treasury, the islands of St. Paul and St. George for the exclusive privilege to take fur seals thereon, for the term of twenty years from 1st day of May, 1870, for the annual sum of \$111,000. This proposal is made with a full knowledge of the act approved July 1, 135 A. D. 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska." And the undersigned is ready and willing to comply with such regulations as may be prescribed by the Secretary of the Treasury on giving bond and security for faithful compliance with said act of July 1, A. D. 1870, and such further regulations as the Secretary of the Treasury may make and prescribe relative to public schools on said islands and the payment of wages to the inhabitants or natives of said islands of St. Paul and St. George, Alaska.

THOMAS W. SWENEY,  
*716 Walnut Street, Philadelphia.*

[14.]

NEW YORK, *July 19, 1870.*

The undersigned, Louis A. Welton, residing in the city of New York, State of New York, whose post-office address is P. O. box No. 444, Washington, D. C., and post-office box No. 4169, New York City, proposes to lease from the Government of the United States of America, through the honorable the Secretary of the Treasury, the islands of St. Paul and St. George for the exclusive privilege and right to take fur seals thereon for the term of twenty years from the 1st of May, A. D. 1870, for the annual sum of \$96,000. This proposal is made with full knowledge of the act approved July 1, A. D. 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska." And the undersigned is ready and willing to comply with such regulations as may be prescribed by the Secretary of the Treasury, to give bond and security for faithful compliance with the provisions of said act of 1st of July, 1870, and such further regulations as the honorable the Secretary of the Treasury may make and prescribe relative to public schools on said islands, and the payment of wages to the natives or inhabitants of said islands of St. Paul and St. George, Alaska.

Respectfully submitted.

LOUIS A. WELTON.

136 Counsel for defendant offered in evidence a certified copy of the first lease, being the lease to the Alaska Commercial Company, dated August 3, 1870. The same was admitted in evidence and marked "Defendant's Exhibit 15," including the amendment to the lease, and the ratification thereof by the lessee company.

Counsel for defendant offered in evidence a statement of the fur seals taken under the first lease from 1871 to 1890, found at page 128 of Appendix I to the case of the United States before the Paris Arbitration Tribunal, American edition. The same was admitted and is as follows:

*Fur-seal skins taken from the Pribilof Islands between the years of 1868 and 1891.*

	Number.		Number.		Number.
1868.....	240,000	1876.....	87,900	1884.....	99,733
1869.....	87,000	1877.....	76,584	1885.....	100,395
1870.....	9,965	1878.....	100,152	1886.....	99,890
1871.....	96,697	1879.....	101,004	1887.....	100,996
1872.....	100,352	1880.....	98,923	1888.....	99,116
1873.....	100,437	1881.....	102,386	1889.....	99,937
1874.....	102,221	1882.....	97,798	1890.....	21,238
1875.....	100,036	1883.....	74,258	1891.....	13,473

Counsel for defendant offered in evidence all the bids other than those of the defendant contained in Plaintiff's Exhibit 2, and the same were admitted and are found in Plaintiff's Exhibit 2.

Counsel for the defendant offered in evidence a letter from the Secretary of the Treasury to the North American Commercial Company, the defendant, dated April 13, 1891. The same was admitted and marked "Defendant's Exhibit 16."

Counsel for defendant offered in evidence a certified copy of a letter and protest addressed by the defendant to the Secretary of the Treasury, dated March 22, 1892, with its enclosure. The concluding paragraph of said letter beginning "said company therefore protests," was admitted in evidence and marked "Defendant's Exhibit 17."

In respect to the settlement for the year 1891, counsel for defendant offered in evidence the original letter addressed by the Acting Secretary of the Treasury to Hon. N. L. Jeffries, attorney for the defendant, dated March 25, 1892, and the same was admitted and marked "Defendant's Exhibit 18."

Counsel for defendant offered in evidence a letter from said Jeffries on behalf of the defendant, setting up the company's claim for the year 1891, dated April 12, 1892, and the same was admitted and marked "Defendant's Exhibit 19."

Counsel for defendant offered in evidence the receipt of the Assistant Treasurer of the United States for the amount paid on such settlement, dated June 18, 1892, for \$46,749.23, which was admitted and marked "Defendant's Exhibit 20."

Counsel for defendant offered in evidence a letter from the Secretary of the Treasury to the said Jeffries, as attorney for the defendant, dated

June 27, 1892, which was admitted and marked "Defendant's Exhibit 21."

Counsel for defendant offered in evidence a letter from Acting Secretary of the Treasury to said Jeffries, as attorney for defendant, dated April 25, 1892, apprising him of the *modus vivendi*, which was admitted and marked "Defendant's Exhibit 22."

Counsel for defendant offered in evidence a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated April 12, 1892, making a claim for damages found in Vol. 2, of the Paris Arbitration Proceedings, American edition, Appendix I, page 520, which was admitted and is as follows:

"WASHINGTON, April 12, 1892.

"Hon. CHARLES FOSTER,

*Secretary of the Treasury.*

"SIR: I am instructed by the North American Commercial Company, the lessee of the right to take fur seals for their skins in Alaska, to present for payment by the United States its account for \$1,532,947.44, due to said company from the United States by reason of said company's having been prohibited by the United States, during the years 1890 and 1891, from taking the number of fur seals on the islands of St. Paul and St. George, to which it was entitled under the law and its contract with the United States, dated March 12, 1890.

"It appears from the records of the Treasury Department that said company was authorized by the Secretary of the Treasury to take a quota of 60,000 seals for their skins during each of the years 1890 and 1891, under the subsisting contract between the United States and the lessee and in conformity with the law regulating the same.

"It further appears from the records of the Treasury Department that the United States prohibited said company from taking its said quota of 60,000 in 1890 and said quota of 60,000 in 1891, and that the lessee was restricted to a quota of 20,995 fur seals in 1890 and to 13,482 in 1891. So that instead of securing 120,000 in 1890 and 1891, the lessee received but 34,477 during both years.

"Respectfully submitted.

"THE NORTH AMERICAN COMMERCIAL COMPANY.

"By N. L. JEFFRIES,

*Its Attorney.*"

In respect to the settlement for the year 1892, counsel for defendant offered in evidence a certified copy of a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated December 30, 1892, which was admitted and marked "Defendant's Exhibit 23."

Counsel for the defendant offered in evidence a letter from the Secretary of the Treasury to said Jeffries, as attorney for the defendant, dated January 11, 1893, which was admitted and marked "Defendant's Exhibit 24."

Counsel for the defendant offered in evidence a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated January 12, 1893, which was admitted and marked "Defendant's Exhibit 25."

Counsel for defendant offered in evidence a certified copy of a letter to the said Jeffries, as attorney for the defendant, from the Secretary of the Treasury, dated January 25, 1893, which was admitted and marked "Defendant's Exhibit 26."

Counsel for defendant offered in evidence receipt of the Assistant Treasurer of the United States for the amount paid in settlement, \$23,-972.60, dated January 28, 1893, which was admitted and marked "Defendant's Exhibit 27."

Counsel for defendant offered in evidence a certified copy of an extract from the report of Mr. Ainsworth, special agent of the Government, made to Mr. Crowley, general agent of the company in the season of 1893, which was admitted and marked "Defendant's Exhibit 28."

Counsel for defendant also offered in evidence report of Mr. Crowley, agent of the company, to the Secretary of the Treasury, dated November 20, 1893, relative to the killing of seals in the year for which this action was brought, which was admitted and marked "Defendant's Exhibit 29."

Counsel for defendant offered in evidence a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated May 11, 1894, which was admitted and marked "Defendant's Exhibit 30."

Counsel for defendant offered in evidence a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated May 25, 1894, which was admitted and marked "Defendant's Exhibit 31."

Counsel for defendant offered in evidence from the case of the United States before the Tribunal of Arbitration at Paris so much as is  
140 contained on pages 286 to and including 291, relating to the claim of the United States against Great Britain for damages, which was admitted and is as follows :

#### CLAIM OF THE UNITED STATES FOR DAMAGES.

"Article V of the Convention of April 18, 1892, for the renewal of the *modus vivendi* in Behring Sea, provides that 'if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens, and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds.'

Any damages to which the United States may become entitled under this Convention must be by way of compensation, first, to the Government for the loss of revenue sustained through the diminution of the number of seals caught; and, second, to the North American Commercial Company for the loss of profits incurred through the same cause.

I. The claim of the Government: By the lease made in 1890, the North American Commercial Company agreed to pay to the Government for the exclusive right to catch seals in the Pribilof Islands an annual rent of \$60,000, the legal tax of \$2 for each seal caught and a bonus on each seal of \$7.62½. Owing to the fact that the catch during 1891 was

so restricted by Treasury regulations, connected with the *modus vivendi* of last year, as to amount to only 13,482 seals instead of the 100,000 seals prescribed by statute, the Secretary of the Treasury agreed on June 27, 1892,\* to accept from the lessees for the year ending April 1, 1892, in lieu of the above rents and taxes, the following sums, viz:

141	Tax on 13,482 seals at \$2.....	\$26,964.00
Rental	$\left( \frac{13,482}{100,000} \times \$60,000 \right)$ .....	8,089.20
Bonus on 12,251 good skins :		
	$\left( \frac{12,251}{100,000} \times \$7.62\frac{1}{2} \right) \times 12,251$ .....	11,444.13
Total	.....	46,497.33

It will be observed that in the above computation, the first item, viz, the tax, remains the same as before. The second item, viz, the rental, which in the lease is \$60,000, is reduced in the proportion which the actual catch of 13,482 bears to the maximum catch of 100,000. The third, viz, the bonus per seal skin, has been reduced on the same principle.

No definite arrangement has as yet been made between the Treasury and the lessees as to the amount to be paid by the latter for their franchises for the current year, but if, as is almost certain, the above-mentioned arrangement will be continued, then the loss sustained by the Government, for which it is entitled to indemnity from the arbitrators, can be estimated by substituting for the number 13,482 in the above computation such a number as the arbitrators shall find might safely have been taken in excess of the 7,500 provided for in the convention.

For example, if it is determined that 40,000 seals might have been taken over and above the 7,500, then the Government will be entitled to an indemnity of \$226,000, obtained as follows :

Tax on 40,000 seals at \$2.....	\$80,000
Rental $\left( \frac{40,000}{100,000} \times \$60,000 \right)$ .....	24,000
Bonus $\left( \frac{40,000}{100,000} \right) \times \$7.62\frac{1}{2} \times 40,000$ .....	122,000
Total.....	226,000

142 The Government is entitled to damages in this amount because this sum represents the excess which it would receive from the lessees if the catch, instead of being limited to 7,500, were limited to the number of seals which could be taken without an undue diminution of the seal herd, provided the arbitrators found that number to be 47,500. If they actually determine upon a different number, then the result given above, by way of illustration, must be increased or diminished accordingly.

\* Letter, Vol. I., p. 521.



II. The claim of the lessees: Under the convention of April 18, 1892, the North American Commercial Company are entitled, as the lessees of the Government, to such an indemnity as shall compensate them for the loss of profits incurred through the forced diminution in the catch of seals. When the arbitrators have determined the number of seals which might safely have been taken during the present season over and above the 7,500 allowed by the convention, it will be for them to determine next the amount of profit which the lessees would probably have derived from this increased catch over and above that which will be actually realized from the catch of 7,500 prescribed by the convention. The balance of profits so obtained will constitute the sum to which the lessees are entitled as an indemnity under the section of the convention above cited.

In determining the amount of profit obtained from each seal, some information may be derived from a claim for damages, which the lessees have filed in the United States Treasury Department for the years 1890 and 1891, a copy of which is found in the Appendix.\* It may be added that this claim was adjusted on June 27, 1892,† by the remission by the Treasury Department, as stated above, of the greater part of the rental and bonus due for the year 1891 under the lease. As the high prices for seal skins in the London market in 1890 and 1891 still continue, the estimate of profits in the above-mentioned claim would probably be as correct at the present time as in the years for which they were made.‡

The arbitrators will derive aid in determining how large a catch might have safely been made during the present season by reference to the following affidavits, viz, those on pages 73, 93, and 111, in Vol. II, of Appendix.

It is important to observe also the language of Sir George Baden-Powell, one of the commissioners sent by Great Britain in 1891 to examine into the condition of the seal industry. In his dispatch of March 9, 1892, to Lord Salisbury he said: "With reference to the *modus vivendi*, I am of the opinion that the taking of one season's limited crop can not injure the seal herd, but although not necessary, the renewal of last year's prohibition and the 7,500 limitation would be beneficial." He then suggests the arrangement afterwards adopted, viz, that 7,500, "instead of 30,000," be taken on the islands, evidently employing the latter number, viz, 30,000, to designate the quantity of seals which might safely be taken by the United States, which is the same number as that suggested by Sir Julian Pauncefote in his letter to Mr. Blaine of February 29, 1892.§ In view of these circumstances it is submitted that 30,000 seals is the minimum number which the arbitrators can reasonably assign as a safe catch during the present season."

Counsel for defendant offered in evidence letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, dated

\* North American Commercial Company to the Secretary of the Treasury, April 12, 1892, Vol. I, p. 520.

† The Secretary of the Treasury to North American Commercial Company, June 27, 1892, Vol. I, p. 521.

‡ The price of a seal skin in London in 1890 rose as high as 146s., and in 1891 as high as 125s. See Alfred Fraser, Vol. II, p. 561.

§ British Blue Book, U. S. No. 3 (1892) C, 6635, p. 155.

November 27, 1895, claiming damages, which was admitted and marked "Defendant's Exhibit 32."

144 Counsel for defendant offered in evidence a letter from the Secretary of the Treasury to the said Jeffries, as attorney for the defendant, dated December 24, 1895, rejecting such claim, which was admitted in evidence and marked "Defendant's Exhibit 33."

Counsel for defendant offered in evidence a letter from the Secretary of the Treasury to Mr. Lloyd Tevis, president of the defendant, dated March 28, 1894, which was admitted and marked "Defendant's Exhibit 34."

Counsel for the defendant offered in evidence a letter from George S. Boutwell, Secretary of the Treasury, to John F. Miller, president of the Alaska Company, dated April 18, 1872, which was admitted and marked "Defendant's Exhibit 35."

[The defendant then rested.]

The plaintiffs thereupon, in order to maintain the said issues on their part and in rebuttal of the defendant's evidence, put in the following evidence.

Counsel for the plaintiffs offered in evidence a certified copy of a letter from the Secretary of the Treasury to Lloyd Tevis, president of the defendant, dated May 12, 1894, which was admitted and marked "Plaintiffs' Exhibit 36."

Counsel for plaintiffs offered in evidence a letter from the Secretary of the Treasury to said Jeffries, as attorney for defendant, dated June 4, 1894, which was admitted and marked "Plaintiffs' Exhibit 37."

Counsel for plaintiffs, in rebuttal of the claim of the Government of the United States before the Behring Sea arbitrators, offered in evidence from one of the protocols contained on page 34 of Vol. I of the American edition of the proceedings before the Tribunal of Arbitration at Paris, the following statement: "Hon. Edward J. Phelps announced that the United States would not, on its behalf, ask the tribunal for any finding for damages upon and under Article 5 of the Convention or  
145 modus vivendi of April 18, 1892. Sir Charles Russell further announced that Great Britain would not ask the tribunal for any finding of damages upon or under Article 5 of the convention of April 18, 1892."

Counsel for the plaintiffs offered in evidence a letter from said Jeffries, as attorney for the defendant, to the Secretary of the Treasury, relating to the take of seals in 1892, dated January 12, 1893, which was admitted and marked "Plaintiffs' Exhibit 38."

CHARLES J. GOFF, recalled as a witness for the plaintiffs, testified as follows:

By Mr. MACFARLANE:

I testified that I was the agent of the Government on the Pribilof Islands in the seasons of 1889 and 1890. I made an official report to the Secretary of the Treasury at the conclusion of each season. I carefully examined the condition of the seal herd on the islands during the years I was there. I heard Mr. Tingle's testimony yesterday in regard to the number of seals that he could have taken on these islands in 1890

without detriment to the herd. He testified, as I remember, that he could have taken 35,000, and that I stopped him on July 20th, when he had taken something over 20,000. In my opinion, no more seals could have been taken in that year without detriment to the herd than the 20,000 I permitted to be taken. The defendant company used their utmost endeavors to get all the merchantable seals that hauled out in 1890. It had to make unusual exertions to get the number of seals that I allowed them to take—namely, 20,995. I thought that the defendant company made unusual exertions to get that number. The drives were frequent and were made whenever Mr. Tingle concluded that he could get a few seals from the hauling grounds. In my opinion, no more seals than the number I allowed in that season could have been taken without detriment to the herd. In my judgment at the close of the season of 1890 the herd was in a very depleted condition, driven to death from the rookeries, and the drives that were being made were not justifiable. They were not taking a sufficient number of seals to justify the drives. They were driving the seals over and over again.

(Counsel for the plaintiff offered in evidence the official reports of the witness C. J. Goff for the year 1889 and 1890, there being two for 1889 and one for 1890.)

Counsel for defendant objected to same as incompetent. The objection was overruled and an exception was then and there taken by the defendant. The reports were marked in evidence, respectively, Plaintiffs' Exhibit 39, 40, and 41.)

Witness continued: I noticed a difference in the herd in 1890 from what it was in 1889 when I was agent on the islands. In respect to numbers its condition in 1890, as compared with its condition in 1889, was very much decreased. In 1889 100,000 seals were taken.

The following quotation from my report of 1890 expresses my convictions of what was necessary for the preservation of that herd at the end of the season in 1890:

"In conclusion, I respectfully suggest that there be no killing of fur seals for their skins on these islands nor in the waters of Behring Sea for an indefinite number of years, to be named by the Secretary of the Treasury, and let nature take her course in replenishing the rookeries, and that the Department take the entire matter of protecting these rookeries under its immediate supervision, for I regard any other system of protection dangerous to the future of all interested. The limited number of seals killed this season by the lessees will undoubtedly leave the majority of the natives in absolute want, and their condition will appeal to the Department for aid."

147 In reply to the court:

The killing of bachelor seals would not effect the depletion of the herd for commercial purposes if they were killed the proper sizes and the proper age seals.

By Mr. MACFARLANE:

As the result of my observation in respect to the number of bachelor seals on the islands in 1890, I thought all merchantable seals had been killed, and that the drives they were making were only driving up the young seals which would be merchantable seals the following year, and

it was the driving and redriving of these young seals. I thought the number I allowed them to take was the largest number of killable seals, in my opinion, that could be taken in safety.

In answer to the court:

The representatives of the defendant did not agree with me on that subject.

By Mr. CARTER:

The general agent of the defendant on the islands at the time, when I stopped the taking of seals, was George R. Tingle. When I prohibited the killing, he protested in writing. My occupation prior to going to these islands was just doing business generally. I had had no particular calling or pursuit in life. I first went there in 1889.

I think I gave ten days' notice in writing to stop taking seals. I don't remember the date, but I did give notice that I would stop the killing on the 20th day of July. That notice was given at least ten days beforehand, and the defendant continued killing up to the 20th of July. So that when I gave the notice that I was going to stop the killing, they could still go on and kill some more up to the 20th. If I had had the matter in my power, I would have stopped the killing when I gave notice or before that, but I would have allowed killing that season to a certain extent. I would have allowed the merchantable seals to be killed; but how many I don't know and have no idea. Nor have I any idea at what time I would have given notice to stop. In 1890, when I stopped the killing, I don't know that they had taken any unmerchantable seals. They took quite a number of small skins, but I think you might call them merchantable skins.

By Mr. MACFARLANE:

I had official instructions from the Secretary of the Treasury prior to going to the islands in 1890. They stated the 20th of July as the date on which I was to stop the killing.

(Counsel for plaintiff offers in evidence the instructions referred to. The same were admitted and marked "Plaintiff's Exhibit 42.")

By Mr. CARTER:

I acted in obedience to the instructions of the Secretary of the Treasury in ordering this killing to be stopped. I had instructions from him to stop on the 20th of July if I thought it would prove a detriment to the herd if the killing proceeded any further. I was to use my discretion.

In reply to the court:

I mean that I had no power to stop them earlier, but, if I thought it advisable I could stop the killing on that day.

By Mr. CARTER:

The condition of the rookeries varies in the number of seals present on them from day to day and from week to week and up to the time when the seals take their departure.

By Mr. MACFARLANE:

I do not remember receiving any instruction by the Secretary of the Treasury to stop the killing of seals on the 20th of July, 1890, other

than the written instructions referred to. I do not remember any such instructions by telegram.

(Testimony closed.)

149 The following are the exhibits referred to in the foregoing, and numbered as therein stated:

#### PLAINTIFFS' EXHIBIT 1.

*Proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska.*

TREASURY DEPARTMENT,  
*Washington, D. C., December 24, 1889.*

The Secretary of the Treasury will receive sealed proposals until twelve o'clock noon on the 23d day of January, 1890, for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeable to the provisions of the statutes of the United States.

In addition to the specific requirements of said statutes the successful bidder will be required to provide a suitable building for a public school on each island, and to pay the expense of maintaining schools therein during a period of not less than eight (8) months in each year, as may be required by the Secretary of the Treasury.

Also to pay to the inhabitants of said islands for labor performed by them such just and proper compensation as may be prescribed by the Secretary of the Treasury.

The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury, in accordance with the provisions of law.

The right is reserved to reject any and all proposals not deemed to be in accordance with the best interests of the United States and of the inhabitants of said islands.

150 As a guaranty of good faith, each proposal must be accompanied by a properly certified check drawn on a United States national bank, payable to the order of the Secretary of the Treasury in the sum of one hundred thousand dollars (\$100,000). The check of the successful bidder will be retained and forfeited to the United States unless he execute the lease and bond required by law.

Proposals should be addressed to the Secretary of the Treasury, Washington, D. C., and endorsed "Proposals for leasing seal islands."

WILLIAM WINDOM,  
*Secretary of the Treasury.*  
J. E. M. T.

F. W.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., Jan'y 20, 1890.*

The Senate of the United States having, on the 16th inst., adopted a concurrent resolution "That the Secretary of the Treasury is hereby

requested not to make any new lease of the islands of St. Paul & St. George, in the Territory of Alaska, for the purpose of taking fur seals thereon, and to postpone all action in relation thereto until after Feb'y 20th, 1890," notice is hereby given that the Secretary of the Treasury will postpone all action under & by reason of advertisement published by him in various newspapers bearing date of Dec. 24th, 1889, for "Proposals for the privilege of taking fur seals upon the islands of St. Paul & St. George, Alaska," until 12 o'clock noon of the 21st day of February, 1890, and to the extent of the change of dates above set forth the said notice for proposals is hereby modified.

WILLIAM WINDOM,  
Secretary.

F. W.

151 Proposals for leasing seal islands of Alaska are published in the following papers:

Boston Advertiser.....	E. o. d. 9 times
New York Tribune.....	" 9 "
Philadelphia Press.....	" 9 "
Chicago Inter Ocean.....	" 9 "
St. Louis Globe and Republic.....	" 9 "
San Francisco Chronicle.....	daily 12 "

By telegraph also given to Government Advertiser, Wash., D. C.

Copy of enclosed extension advertisement sent to each of the above-named papers 4 p. m. Jan'y 20, 1890.—J. R. L.

F. W.

\* 1 PLAINTIFFS' EXHIBIT 2.

Plaintiffs offered in evidence bids 10, 11 and 12. Defendant offered the rest.

*Schedule of proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska, received in response to the advertisements of the Treasury Department of December 24, 1889, and January 20, 1890, and opened at the Treasury Department February 21, 1890, at 12 o'clock noon.*

No. 1. Informal; not considered.

No. 2. The American Fishing and Trading Company, San Francisco, Cal., by Charles D. Ladd, president.

SAN FRANCISCO, CAL., Feb. 11, 1890.

SIR: The American Fishing and Trading Company, a corporation duly and legally organized and existing under the laws of the State of California, hereby makes the following proposal for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty years from the first day of May, 1890, in accordance with the provisions of the statutes of the United States, and pursuant to the terms and conditions of the advertisement and notice of the Secretary of the Treasury, a copy of which is hereto attached.

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The American Fishing and Trading Company will pay to the United States the sum of three hundred and five thousand dollars per annum, for twenty years from the first day of May, 1890, for the exclusive right to take fur seals upon said islands. And in addition thereto the sum of four dollars and twelve cents ( $\$4\frac{12}{100}$ ) for each fur seal skin taken and shipped from said islands, said sums including the revenue [tax or duty prescribed by law and a bonus in addition thereto.

Also twenty-five cents per gallon for each and every gallon of sea oil taken and shipped from said islands. Said company hereby offers to provide a suitable building for a public school on each island and to pay the expenses of maintaining schools, as set forth in said notice by the Secretary of the Treasury and as may be required by him or by law.

Said company offers in addition thereto to pay to the inhabitants \* 2 \* of said islands just and proper compensation for all labor performed by them, and as may be required or prescribed by said Secretary of the Treasury. Said company hereby offers in addition thereto to furnish free of charge the inhabitants of said islands, for their comfort and maintenance, suitable dwelling houses with provisions, oil, food, salt, barrels, and all other articles and things heretofore furnished them or such additional amounts, merchandise, or articles as may at any time be required by the Secretary of the Treasury.

Said company hereby offers, in case it shall be the successful bidder, and obtain said privilege or lease, to purchase from the Alaska Commercial Company, at a fair and just valuation, all buildings, 153 houses improvements, tools, and machinery, now owned by said company upon said islands, and in the event said Alaska Commercial Company will not sell the same, said American Fishing and Trading Company hereby offers to build, erect, construct, and furnish equally as good and valuable buildings, houses, wharves, warehouses, and improvements; and whether acquired by purchase or construction, the American Fishing and Trading Company hereby agree that the same shall, without cost or expense to the United States, become, upon the expiration of the lease, the property of the United States. Said American Fishing and Trading Company hereby offers, in case it shall obtain said privilege or lease, to purchase all stores and merchandise from said Alaska Commercial Company, and belonging to it, upon said islands, at ten per cent above the invoice price thereof. And said American Fishing and Trading Company hereby offers, promises, and guarantees to strictly comply with and fulfill all the conditions and requirements of law and regulations of the Secretary of the Treasury in said matter and to furnish all bonds and securities therefor that may be required, hereby certifying that all the officers, members, and stockholders of said American Fishing and Trading Company are American citizens and that said company is responsible and able and hereby promises and agrees to fully perform and execute any and all conditions that may be imposed by law or the Secretary of the Treasury.

AMERICAN FISHING AND TRADING COMPANY.

By CHARLES D. LADD, *President*.

Hon WM. WINDOM,  
*Secretary of the Treasury.*

154 \* 3 \* No. 3. Informal; not considered.

No. 4. North American Trading Company, by Chas. F. Benjamin, attorney at law.

To the honorable The SECRETARY OF THE TREASURY:

Conformably to your public advertisement, dated December 24th, 1889, the North American Trading Company, a corporation organized under and pursuant to the laws of the State of West Virginia, hereby presents a sealed proposal for the grant of the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States.

First. The said company hereby offers to provide a suitable building for a public school on each island, and to pay the expenses of maintaining schools therein during a period of not less than eight months in each year, as may be required by the Secretary of the Treasury.

Secondly. The said company further offers to pay to the inhabitants of said islands, for labor performed by them, such just and proper compensation as may be prescribed by the Secretary of the Treasury.

Thirdly. The said company further offers to furnish, free of charge, to said inhabitants, such kinds and amounts of provisions and fuel as may be necessary to their comfort, and as the Secretary of the Treasury may determine and prescribe.

Fourthly. The said company further offers to pay to the United States an annual rental for said islands of fifty-five thousand (\$55,000) dollars.

155 Fifthly. The said company further offers to pay the prescribed revenue tax or duty of two dollars upon each fur-seal skin taken and shipped by the company from said islands.

Sixthly. The said company further offers to pay a royalty to the United States of four  $\frac{50}{100}$  dollars upon each fur-seal skin so taken and shipped.

(NOTE.—On the basis of an estimated catch of sixty thousand seals, the offers contained in the fourth, fifth, and sixth paragraphs would yield the Government an annual revenue of \$445,000, or \$254,500 in excess of the annual revenue heretofore derivable from a like catch of 60,000 seals, to which add the advantages contained in the first, second, third, seventh, and eighth paragraphs of this proposal.)

Seventhly. The said company further offers to pay a royalty of thirty cents per gallon for each and every gallon of oil obtained from said seals for sale and sold by the company.

(NOTE.—In the lately existing lease the royalty is fixed at 55 cents per gallon, but proving more than the article would bear, the lessees  
\*4 \*did not use the privilege of the oil, whereby six million gallons of seal oil have been lost to commerce and a large revenue to the Government. On a basis of a royalty of 30 cents, it is believed that the necessary plant for obtaining the oil and the necessary labor and expense of creating a market might be ventured upon. Should the venture prove successful, the revenue to the Government might equal 60 cents per slaughtered seal.)

Eighthly. The said company, at its own expense, further offers to establish and maintain a monthly mail service, for at least eight  
 156 months in each year, between San Francisco and the seal islands, touching at St. Paul, on Kodiak Island; Chignik Bay, on the peninsula of Alaska; Sand Point, in Humboldt Bay, and Oumalaska, via Belkofsky.

(NOTE.—This offer is of great importance to the Government and to the growing trade and population of Alaska. The intermediate points named are places of importance and accessible to numerous settlements and towns. Equivalent points may be substituted if so desired, and the company proposes to submit further observations on the value of this offer.)

The said company hereby declares and guarantees that it is, and that its stockholders are, within the true intent and meaning of the statute proper, responsible, and in all other respects qualified to offer and compete for, and to receive the grant, lease, and privilege described and contemplated in said advertisement.

The said company hereby further declares and guarantees that all the provisions, limitations, and requirements of law, and of all lawful rules and regulations of the executive branch or department of the Government, and of the aforesaid advertisement, are to be considered, regarded, and treated as part and parcel of this proposal, without further naming, expressing, or reciting any of such provisions, limitations, and requirements.

The said company further declares and guarantees that, so far as its influence and means may extend, it will use all reasonable and proper measures for the material and moral improvement of the native population of the Territory of Alaska, and for their preservation from degeneracy and corruption.

The said company further declares and guarantees that, so far as its means and influence may extend, it will use all reasonable and proper measures towards the population of said Territory and the advantageous development of its industries and resources.

157 The said company further declares and guarantees that in the event of the lease of the aforesaid seal islands being awarded to the company, it will use all reasonable means and efforts to preserve and improve the fur-seal industry, the market for seal skins, the revenue interests of the Government, and the industrial interests of the natives therein; also, to encourage and promote, so far as it reasonably can, domestic participation in the various stages of curing dressing,  
 \*5 finishing,\* making up, and marketing seal skins and their product; and, further, to so conduct its entire business as to conserve the natural wealth and resources of the Territory of Alaska.

The said company further declares and guarantees that it will extend all reasonable facilities to the agents of the Government in maintaining and preserving the unworked seal rookery at Otter Island in Behring Sea.

The said company further declares and guarantees that it will employ in the execution of the lease persons of approved skill, experience, and character, and in sufficient number for a proper working of said lease to the satisfaction and security of the Government, and that there shall be no unnecessary delay in placing such persons in charge of the details of

the business as soon as the lease shall be duly awarded and executed, and that all improper or undesirable persons shall be excluded from participation in the business and the service of the company.

The said company further declares and guarantees that it will pay due regard to all suggestions of the Secretary of the Treasury, or his proper representatives, during the continuance of the lease, and will faithfully cooperate with the officers of the Government in carrying out the true intent, object, and purpose of the legislative and executive branches of the Government, and will at all times submit its business and affairs to the scrutiny and advice of the said Secretary and his proper representatives.

158 The said company further declares and guarantees that it will promptly provide, establish, and maintain an adequate and proper plant for the efficient conduct of the business in all its details, and will keep proper offices and establishments at San Francisco and wherever else needed, with a suitable administrative staff, and that in all respects it will place and keep itself and its agents in a position to meet all just and reasonable requirements of the Government, the natives, and the public.

The said company hereby tenders and delivers to the Secretary of the Treasury a certified check, drawn on a United States National Bank, in the sum of (\$100,000) one hundred thousand dollars, payable to the order of the Secretary of the Treasury, which check is to be retained and forfeited to the United States should the said company fail or refuse to execute a lease, if required to do so, conformably to this proposal, and to execute the bond and give the security required by law.

In witness whereof the attorney and agent of said company hath hereunto set his hand this 21st day of February, 1890.

CHAS. F. BENJAMIN,

*Attorney and Agent, North American Trading Company.*

\*6. \* No 5. The Pacific Steam Whaling Company, San Francisco, Cal., by J. N. Knowles, acting president; Edwin L. Griffith, secretary.

SAN FRANCISCO, *February 14, 1890.*

The Pacific Steam Whaling Company, a corporation organized and existing under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California, in accordance with a resolution adopted at a special meeting of its board of directors called for the purpose and held on the 14th day

159 of February, 1890, certified copy of which resolution is hereunto annexed, make the following proposal to lease the islands of St. Paul and St. George, Alaska, for the exclusive right to take fur seals upon said islands in accordance with the advertisement of the Secretary of the Treasury under date of December 24, 1889, subject to the conditions and obligations as appear in said advertisement hereunto annexed.

The said Pacific Steam Whaling Company will pay for said exclusive privilege the sum of fifty thousand dollars ( $50,000 \frac{0}{100}$ ) per annum rental, and in addition thereto the sum of seven and  $\frac{1}{2}$  (two dollars (\$2.00))

tax and five dollars and  $\frac{15}{100}$  (5.15) bonus per skin) dollars ( $7\frac{15}{100}$ ) per skin for each and every seal skin taken on said islands.

[SEAL.]

PACIFIC STEAM WHALING CO.  
By J. N. KNOWLES,

*Acting President.*

EDWIN L. GRIFFITH,  
*Secretary.*

To Hon. WILLIAM WINDOM,

*Secretary of the Treasury, Washington, D. C.:*

At a special meeting of the board of directors of the Pacific Steam Whaling Company, held this 14th day of February, 1890, the following resolutions were unanimously adopted, viz:

"Resolved, That J. N. Knowles, acting president, and E. L. Griffith, secretary, be, and they are hereby, duly authorized to submit, in the name of the company, a proposal for the securing, if possible, of the contract to lease the seal islands in Alaska, as per the advertisement of the Secretary of the Treasury of the U. S., dated December 24th, 1889.

"Resolved, That the said proposal shall be transmitted to Washington, D. C., by the hands of George H. Collins, one of the shareholders of this company."

We hereby certify that the foregoing is a true and correct copy of resolutions unanimously passed at the special meeting of the board  
160 of directors of the Pacific Steam Whaling Company held at its  
office in the city of San Francisco, State of California, on the  
\*7 14th day of February, 1890,\* said special meeting having been  
called for the purpose of taking action with reference to the lease  
of the islands of St. George and St. Paul, Alaska.

[SEAL.]

J. N. KNOWLES,  
*Acting President.*

EDWIN L. GRIFFITH,  
*Secretary.*

No. 6. The Alaska Commercial Company, by Louis Sloss, president.

WASHINGTON, D. C., *February 20, 1890.*

To the Honorable WILLIAM WINDOM,

*Secretary of the Treasury.*

SIR: In response to your advertisement inviting proposals for the lease of the right to take fur seals in Alaska for the period of twenty years from May 1, 1890, the Alaska Commercial Company of San Francisco, being the party heretofore engaged in the trade and the protection of the fisheries, as specified in section 1963, Revised Statutes, respectfully submits the following proposal:

The said company hereby offers to pay to the United States for said lease the following considerations and amounts, viz:

1st. An annual rental of fifty thousand dollars, and will deposit an equal amount in United States bonds as security therefor.

2d. Said company will pay a revenue tax or duty of two (\$2) dollars on each fur-seal skin taken and shipped from the seal islands during the continuance of the lease.

3d. Said company will pay the further sum of four and  $\frac{50}{100}$  dollars on each seal skin taken and shipped from said islands during the continuance of said lease.

4th. Said company will pay the further sum of twenty-five (25) cents on each seal skin taken and shipped from said islands, for the comfort and maintenance of the inhabitants of the seal islands, and in excess of proper monthly wages while taking, salting, and shipping skins.

5th. Said company further agrees to provide sixty (60) comfortable frame dwelling houses for the inhabitants of Saint Paul Island, and forty similar dwelling houses for the inhabitants of Saint George Island, and maintain them in good condition and repair free of cost during the continuance of the lease.

6th. Said company will furnish to the inhabitants of the said seal islands, each year during the continuance of the lease, eighty tons of coal free of cost.

7th. Said company will furnish to the inhabitants of said islands, each year during the continuance of the lease, fifty barrels of meat, free of cost.\*

8th. Said company agrees to provide proper and sufficient cold storage or canneries to preserve seal meat suitable for food for said inhabitants, as well as for the inhabitants of the Aleutian group or chain of islands, and maintain the same in good condition during the continuance of the lease free of cost. By this means the killing of young seal pups for food may be discontinued and the waste of seal life be prevented.

9th. Said company will maintain on each of the seal islands, at its own cost during the continuance of the lease, a competent and experienced physician, and furnish said inhabitants medical attendance and medicines free of charge.

10th. Said company will maintain a school on each of said seal islands for a period of eight (8) months in each year, during the continuance of the lease, free of charge.

11th. Said company will provide for all widows and orphans and aged and infirm inhabitants of said islands, who are unable to provide for themselves, at its own cost, during the period of the lease.

12th. Upon the written request of the Treasury agent in charge, the company will furnish free transportation to the natives of the islands to any point in Alaska that its vessels touch.

13. Said company will furnish to the native inhabitants of said islands goods and supplies at a cost not to exceed twenty-five per cent above their wholesale price in San Francisco.

14th. Said company will improve and keep in repair roadways from the villages of St. Paul and St. George to sealing stations and shipping points, for the permanent improvement of the Government reservation and the preservation of the fisheries.

15th. Said company will improve the water supply on said islands by bringing water in pipes to the villages for the health and comfort of the natives and Government officers and agents and the improvement of the Government reservation, and keep the same in repair during the continuance of the lease.

16th. Said company will deepen and improve the channels and landings at said islands, so as to avoid risk to life and property, and keep the



same in repair during the continuance of the lease, which will permanently benefit the Government reservation.

17th. Said company will carry the United States mails to all points in Alaska reached by its steamers or vessels, during the continuance of said lease, at its own cost.

18th. Said company will establish a regular mail service from Sitka to Kodiak and Ounalaska during the four summer months, and continue the same for the entire term of the lease, free of cost to the Government.

163 19th. Said company further agrees to furnish on each of said islands a building suitable for a public hall and library, and to provide for each a properly selected library for the free use of all  
\*9 persons on said islands,\* and to maintain the same at its own cost during the continuance of the lease.

20th. Said company further offers to furnish for the use of the inhabitants of the island of Ounalaska twenty frame dwelling houses, and keep the same in repair during the continuance of said lease free of cost.

21st. Said company further agrees to furnish a proper schoolhouse, provide a competent teacher, and maintain a school for a period of eight months in each year during the continuance of the lease free of cost.

22d. Said company will station at Ounalaska an experienced physician, and provide medicines and medical treatment free of cost during the continuance of the lease to the inhabitants of this and other islands of the Aleutian chain.

23d. Said company will establish at Ounalaska a hospital for sick and disabled seamen and natives, with a supply of twenty beds, nurses, medicines, medical and surgical instruments, and proper accommodations, and maintain the same during the continuance of the lease at its own cost.

24th. Said company will establish at Ounalaska, and maintain the same during the continuance of the lease at its own cost, a school for the instruction of the Aleuts in the useful trades, such as carpentry, boat building, and blacksmithing, with a view to the comfort, maintenance, and education of the inhabitants of the Aleutian Islands.

25th. Said company will maintain a supply of coal at Ounalaska, not exceeding one thousand tons per annum, and furnish from same the vessels of the Revenue Marine and U. S. Navy such quantities as  
164 their needs may require at a price not exceeding the actual cost of said coal as laid down at Ounalaska.

26th. Said company further agrees to furnish wharf privileges at Ounalaska, and the use of its barges, lighters, and boats at the Seal Islands, to United States vessels during the continuance of said lease free of charge.

27th. Said company further offers to establish and maintain, at its own cost during the continuance of the lease, at Ounalaska, a depot of supplies, provisions, small stores, and clothing, for the needs of destitute inhabitants of the Aleutian Islands, and to distribute the same gratuitously at points other than Ounalaska.

As a guaranty of the good faith of the Alaska Commercial Company in submitting the foregoing proposal for said lease, and in compliance with the requirements of the advertisement, said company herewith places in the hands of the Secretary of the Treasury a certified check in the sum of one hundred thousand dollars, drawn by Alfred Fraser on

the American Exchange National Bank of New York, and payable to the order of Hon. William Windom, Sec'y of the U. S. Treasury.\*

Said company will execute and deliver to the Secretary of Treasury a bond, with securities to be approved by the Secretary, in the sum of five hundred thousand dollars, conditioned for the faithful observance of all laws and requirements of Congress and the regulations of the Secretary of the Treasury touching the taking of fur seals and the disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith.

## II.

In the event that any company, person, or persons, who is "a proper and responsible party" within the true intent and meaning of the statute, shall offer a greater consideration for said lease than is herein offered therefor by the Alaska Commercial Company, having due regard to the interests of the Government; the comfort, maintenance, and education of the native inhabitants; the interests of the parties heretofore engaged in trade and the protection of the fisheries; in such event, the Alaska Commercial Company reserves the right to adopt said bid or offer as its own, and enter into a lease on the terms stipulated in said bid or proposal in the same manner and to the same effect as though said bid or offer had been originally made by the Alaska Commercial Company, and will furnish the bonds and securities required by law or by the Secretary of the Treasury, and faithfully observe the law and the regulations of the Department.

THE ALASKA COMMERCIAL COMPANY.  
LOUIS SLOSS, *President*.

Honorable WILLIAM WINDOM,  
*Secretary of the Treasury.*

SIR: The Alaska Commercial Company respectfully represents that the several items and particulars set forth in the foregoing proposal for a lease of the right to take fur seals for their skins on the islands of St. Paul and Saint George, in Alaska, for the term of twenty years from May 1, 1890, submitted to you in response to the advertisement, as a part of the consideration offered by said company in its said proposal, and which are in addition to and exclusive of the specific amounts of money offered in and by said proposal as rental tax or bonus, and which said items and particulars are consecutively stated in said proposal, and are numbered from five to twenty-seven, inclusive, are fairly and justly worth to the United States, when carried into effect as proposed by said company, the sum of one hundred and fifty thousand dollars per annum during the continuance of said lease, being equivalent to one dollar and fifty cents per skin on a full quota, or two dollars and fifty cents on a quota of sixty thousand skins.

\* 11 Said company further represents that, from its long experience as the lessee of this business and its constant intercourse with the inhabitants of the Aleutian Archipelago as a general trader for more than twenty years, it has acquired a full knowledge of the true condition, the

pressing necessities, and scant resources of this people, and is thoroughly convinced that a due regard to the interests of the Government, the comfort, maintenance, and education of the inhabitants of the seal islands, but more especially those of the Aleutian chain or group of islands, their civilization, and in fact their preservation as a race, depend largely upon the fulfillment of the offers specified in the said proposal of this company above referred to, or their equivalent by the lessee, or by the United States.

Before submitting its said proposal this company made an accurate estimate of the cost and value of said items and particulars specified and arrival at the conclusion stated, and being satisfied as to its correctness, the company is willing to carry out said offers and to faithfully perform each and all of them; or in the event that the United States elects to perform the same, the Alaska Commercial Company will pay to the United States the sum of one dollar and fifty cents on each seal skin taken and shipped from said islands during the continuance of said lease, in lieu of such service.

THE ALASKA COMMERCIAL COMPANY.

By LOUIS SLOSS, *President*.

WASHINGTON, D. C., *February 20, 1890.*

Amount offered in the foregoing bid:

Rental .....	\$50,000
Tax .....	200,000
Bonus .....	450,000
Items and particulars specified.....	150,000
For benefit of natives of seal islands.....	25,000
<hr/>	
Total per ann .....	875,000

167 No. 7. E. W. Clark, representing Robert W. Stuart, T. W. Pearsall, I. and S. Wormser, J. Fred. Pierson, Simon Borg, A. E. Bateman, Lehman Bros., and associates.

The undersigned, an American citizen residing in Washington, D. C., and representing and being duly authorized to act for Robert W. Stuart, T. W. Pearsall, I. & S. Wormser, J. Fred. Pierson, Simon Borg, A. E. Bateman, Lehman Bros., & associates, & all being American citizens and being proper and responsible persons, do make the following proposals for a lease of the exclusive right to engage in the business of taking fur seals in the islands of Saint Paul and Saint George, in the Territory of Alaska, for the term of twenty years from the first day of May,

\* 12 1890, in accordance \* with the terms and provisions of the statutes of the United States, and of the notice for proposals issued by the Secretary of the Treasury, viz:

1st. The said parties propose to pay to the United States, over and above the annual rental of fifty thousand dollars (\$50,000), and the revenue tax or duty of two dollars (\$2), on each fur-seal skin taken and shipped from said islands, as provided in the said acts of Congress, a bonus of two hundred and ten thousand dollars (\$210,000) to be paid in annual installments of ten thousand five hundred (10,500) for each and every year of said lease.

2d. A bonus of three and  $\frac{59}{100}$  dollars each on the skins that shall be taken and shipped of the fur seals which may be killed under the provisions of law and the regulations of the Secretary of the Treasury. (NOTE.—Under this proposal if 100,000 skins are taken annually the bonus will amount to three hundred and fifty thousand dollars per annum, or seven million dollars during the period of the lease.)

3d. To pay to the inhabitants of said islands for labor performed 168 by them such just and proper compensation as may be prescribed by the Secretary of the Treasury.

4th. For such oil as may be made and sold from the carcasses of the seals killed, the sum of 55 cents for each gallon so made and sold. Please note that each seal carcass is estimated to contain about 2 gallons of oil. If 100,000 seals should be killed annually and the oil obtained from them, the Government would derive an annual revenue from such source of about \$100,000, or a total of \$2,000,000 for the term of the lease.

5th. The said parties further propose to provide a suitable building for a public school, and to maintain and pay for proper schools for the education of the natives in each of said islands for not less than eight months of each year, and to provide a house of worship on the island of St. Paul, and pay for such religious instruction and services as the regulations of the Treasury Department may require.

6th. The said parties further propose to furnish to the inhabitants of the islands named free of charge each year 30,000 dried or salted salmon, sixty cords of wood or tons of coal, and a sufficient quantity of salt for preserving their supply of meat; also 200 barrels of oil yearly, the number seal skins required for supplying them with boats, and as many membranes and sinews as may be necessary for providing such natives with waterproof garments.

And the said parties herewith transmit, as required, check in the sum of \$100,000, duly certified, on the Fourth National Bank of New York, and agree in case of the acceptance of their proposal to enter into the lease without delay, and to make the necessary deposit of bonds and execute all papers required to fully and in all respects comply with the provisions of the laws and the regulations of the Secretary of the Treasury with respect to said lease.

E. W. CLARK.

169 \* 13 \* No. 8. Atlantic and Pacific Company, by Charles H. Tenney, president.

Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

SIR: The "Atlantic and Pacific Trading Company," a corporation duly and legally organized, all of its stockholders being citizens of the United States, and proper and responsible parties, makes the following proposal for the exclusive right to take fur seals upon the islands of St. George and St. Paul, Alaska, for the term of twenty years from the first day of May, eighteen hundred and ninety, agreeable to the provisions of the statutes of the United States, and pursuant to the terms of the advertisements of the Secretary of the Treasury.

The said company will pay to the Government of the United States a rental of fifty-five thousand dollars per annum, for an exclusive right to take fur seals upon the said islands of St. George and St. Paul for twenty years from May first, eighteen hundred and ninety.

The said company will also furnish to the inhabitants of said islands each year twenty-five thousand dried salmon, or the equivalent thereof in salt beef; sixty cords of firewood, or the equivalent thereof in coal; a sufficient quantity of salt and number of barrels for preserving a necessary supply of seal meat; the necessary medicines, and the attention of a physician on each island, all free of charge; and the said company will furnish to the said inhabitants all other proper supplies and merchandise at the cost value thereof, and pay the said inhabitants for sealing and any extra work as they have been paid heretofore.

And the said company further proposes and agrees to pay to the United States, in addition to the revenue tax of two dollars per skin, as provided by law, the sum of six  $\frac{12}{100}$  dollars for each skin taken in each year during the term of said lease.

170 And the said company further proposes and agrees to treat at all times the natives of the Aleutian Islands as neighbors entitled to just consideration, and to receive a just portion of the seal meat, and a sufficient quantity of sinews and membrane for making waterproof garments, all free of charge.

The said company proposes and agrees to maintain suitable schools and schoolhouses, and to provide teachers therefor, so as to advance the mental and moral condition of the natives, all free of charge.

The said company proposes and agrees to buy of the parties heretofore holding the lease of the said islands of St. Paul and St. George, at a fair price, all its property on said islands pertaining to the business of sealing, such as supplies, boarding houses, storehouses, warehouses, salt houses, schoolhouses, stables, skin boats, derricks, and domestic animals.

The said company proposes and agrees that it will in all respects and in every way cheerfully and exactly comply with such lawful  
\* 14 regulations \* as have been or may be hereafter prescribed by the Secretary of the Treasury.

The said company guarantees that among its stockholders, and of those who will actively participate in the business management, are men of skill and experience who are thoroughly familiar with the taking of fur-seal skins on said islands, the shipment thereof, and their sale in the markets of the world.

And in compliance with your advertisements, we enclose our certified check for one hundred thousand dollars, with assurance of our ability to carry out in good faith and give the approved security for all herein set forth, and as required by law and the regulations of the Department.

In witness whereof the said Atlantic and Pacific Trading Company, by its president, has hereunto fixed its corporate name and seal, this 21st day of February, A. D. eighteen hundred and ninety.

[SEAL.]

ATLANTIC AND PACIFIC COMPANY.  
By CHARLES H. TENNEY, *President*.

- 171 No. 9. The North American Commercial Company, Illinois, by Henry L. Turner, its president.

## PROPOSAL.

WASHINGTON, D. C., *Feb'y. 20th, 1890.*

SIR: Subject to the provisions of the laws of the United States governing the matter, and pursuant to the terms of the advertisement of the Secretary of the Treasury, dated December 24th, 1889, and the modification thereof, dated January 20th, 1890, copies of which are attached hereto, the North American Commercial Company, a corporation of the State of Illinois, all of whose stockholders, members, and officers are citizens of the United States, submit the following proposal for the right of taking fur seals on the islands of St. Paul and St. George, in Alaska, and of sending a vessel or vessels for the skins of such seals, for the term of twenty years.

In doing so they have endeavored to make their proposal responsive to both the letter and spirit of all the various requirements of the law, of which the money payment is but one. These requirements (found in sections 1963, 1965, and 1969, U. S. Revised Statutes) provide that the sealing franchise shall be leased—

First. "To proper and reasonable parties."

Second. For a yearly rental of not less than fifty thousand dollars and a tax of not less than two dollars per skin.

Third. "For the best advantage of the United States" and "the best interest of the Government."

\* 15 \* Fourth. "With due regard to the interests of the native inhabitants, their comfort, maintenance, and education."

Fifth. With due regard "to the interests of the parties heretofore engaged in trade."

172 Sixth. With due regard to "the protection of the (seal) fisheries;" and

Seventh. So that the lease shall not "be held or operated for the use, benefit, or advantage, directly or indirectly, of any person other than American citizens."

First. Proper and responsible parties:

The North American Commercial Company, of Illinois, was organized for the purpose of obtaining this franchise and carrying on business thereunder; it has a subscribed capital of three million dollars, and its members represent aggregate individual resources many times that sum. The required deposit of one hundred thousand dollars accompanies this proposal, and the bond required by the law will be promptly furnished if the lease is awarded. The present directors of the company are Messrs. Henry L. Turner, G. B. Shaw, and L. G. Fisher, of Chicago; George H. Treadwell, of Albany, and Herbert L. Terrell, of New York, and among the shareholders are the foregoing and Jay Cooke, W. G. Warden, and Nelson F. Evans, of Philadelphia; William A. Bond and A. R. Barnes, of Chicago; Jos. Walker & Sons and Pierre Humbert, of New York, and others of like character residing in California and other States. In addition to the responsibility of the company and its members, their general fitness for this trust, and a thorough knowledge from



exhaustive investigation of the seal-fur industry, its methods and markets, ample expert knowledge of the fur business in all its aspects is assured by the presence in the company's management of the head of the well-known firm of Treadwell & Co., the leading manufacturing seal-fur house of America. While the work of taking the seals on the islands and preparing the skins for shipment is perfectly simple and is done exclusively by the natives, whose skilled labor, as required by the Government, will be employed by the new lessees as by the former, this

173 company will further guarantee to employ on each island one or more competent superintendents who have had actual experience in supervising this industry on said islands.

Second. Rental and tax:

(1) This company will pay to the United States a yearly rental \$56,000.00.

(2) Also, the statutory tax or duty of two dollars (\$2.00) per skin.

(3) Also, a bonus or royalty of \$5.<sup>11</sup>/<sub>100</sub> per skin taken. This bonus would amount to \$511,000.00 per annum on a catch of 100,000 seals and, on the same basis, to \$10,220,000.00 during the life of the lease, making the total revenue to the Government in twenty years \$15,340,000.00 as compared with \$6,350,000.00 received during the past twenty years under the lease to the Alaska Commercial Company.

\*16 \*Third. The best interests of the United States:

The character of this proposal as an entirety will determine whether or not it is for the best advantage of the United States, and reference is therefore made to its various parts.

Interests of the native inhabitants:

The seal islands: Said company will provide on each of said islands of St. Paul and St. George a suitable building or buildings for a public school, and will pay the expense of maintaining schools therein during a period of not less than eight months of each year; will pay to the inhabitants of said islands for labor performed by them such just and proper compensation as may be prescribed by the Secretary of the Treasury; will furnish annually, free of charge, to the inhabitants of said islands medical attendance and medicines and such supply of salted or dried salmon, fuel, salt, and barrels as the Secretary of the Treasury shall prescribe, and will comply with such other and additional

174 requirements in this respect as in the judgment of the Secretary of the Treasury experience has shown to be reasonable and expedient. Right and humane treatment of said natives in every respect by the lessees and their agents will be guaranteed, including the furnishing to them of all necessary and proper commodities (other than those to be furnished free) at prices not to exceed twenty per cent above the cost price of the same at wholesale in San Francisco or other natural place of purchase.

The Aleutian Islands: Concerning the natives of the outlying Aleutian Islands, regarded as wards of the nation, the North American Commercial Company is willing to contribute in all reasonable ways to their comfort, maintenance, education, and protection, devoting both means and careful effort to the systematic promotion of their welfare, guarding, however, against any policy which would tend to pauperize and degrade these people by encouraging them to live in idleness on the bounty of

the Government. To this end and subject to regulations to be made by the Secretary of the Treasury, and included in the lease, the company propose as follows:

(1) In the interest of the natives, both of the seal islands and of the Aleutian Islands, and to prevent the gradual depopulation of the former, the North American Commercial Company will, at their own cost, and subject to the approval of the Government, gather up and transfer to the islands of St. Paul and St. George and there furnish remunerative employment to such native inhabitants of other Alaskan islands as it may seem expedient, with their consent and for their advantage, to have thus transferred.

(2) In case the parties now engaged in the business of buying furs and peltries from and selling necessary commodities to certain native inhabitants of the Aleutian Islands shall, by reason of the awarding of

175 the proposed lease to the North American Commercial Company, in fact withdraw from such business, with the result of leaving such native inhabitants destitute of a market for their said prod-

\* 17 ucts and of a convenient \* source for the purchase of needed supplies, the North American Commercial Company will see that the native inhabitants referred to are furnished with a market for their merchantable furs, peltries, and other products at fair current prices fixed by open competition and with necessary supplies on just and moderate terms, avoiding all discrimination against any race or class in prices paid for such products or charged for such supplies.

(3) This company will also, if desired by the Government, establish and maintain, or pay the legitimate expense of establishing and maintaining, on the several Aleutian Islands such reasonable additional number of common schools as, in the judgment of the Secretary of the Treasury, the needs of the native inhabitants of such islands require.

(4) The company will defray the expense of sending a suitable number of native youth from the islands to schools in the States, so that when educated they may if competent return as teachers to their people.

(5) In cooperation with the Government or otherwise this company will contribute to the development of local industries suited to the capacities and surroundings of the natives and intended to render them self-supporting, and will carry out judicious plans for improving the character of their dwellings and promoting the comfort of their condition. It will extend all reasonable facilities over its lines of transit and elsewhere to the representatives of associations whose object is the improvement of said natives and, within the proper limits of its authority, will thoroughly enforce the Government regulations excluding intoxicating liquors.

176 (6) In view of the possible future destitution of the native inhabitants of some of the Aleutian Islands and of the fact that large quantities of the flesh of the seal, their favorite food, necessarily go to waste on the seal islands, this company will arrange to preserve annually a supply of seal meat and distribute the same free of charge to the natives of other islands situated within reasonable distance.

(7) This company will set apart each fifth year a sum of money equal to ten per cent of the excess over an average gross price of \$15.00 per skin, in United States gold coin or its equivalent, which shall have been obtained by said company for the catch of the preceding five years, such

average gross price to be ascertained in manner to be specified in the lease; such sum or fund so set apart to be devoted to promoting the education and general well-being of the native inhabitants of Alaska. Judging the future of the seal-fur market by its past, this provision will produce for this new territory during the life of the proposed lease an educational fund of large magnitude.

Fifth. Interests of the former lessees:

In the matter of exercising "due regard to the interests of the parties heretofore engaged in trade," the North American Commercial Company assumes that the incredible claims put forward in this connection \* 18 by the late lessees at the former letting will neither be advanced nor, if advanced, for a moment considered on the present occasion. To treat such a claim with hospitality or respect would instantly destroy that "genuine and fair competition" to which the public has been officially invited, and which the present Secretary of the Treasury has honorably guaranteed in his recent letter to Chairman Frye, of the Senate Committee on Commerce. But, recognizing that there are equities to be provided for under this feature of the law, the North  
177 American Commercial Company submits the following offer, which is intended and believed to accomplish entire justice and to cover and provide for all rights or preferences to which the former lessees might, under the most liberal construction of the law, be considered entitled.

If awarded the lease, this company will purchase from the Alaska Commercial Company, with their consent, all property owned and employed by them and necessary in carrying on the business of taking fur seals on the islands of St. Paul and St. George, and transporting the skins thereof from said islands, including buildings occupied and used by the natives, and will pay for the same in lawful money such price or prices as may be fixed by arbitrators to be chosen by the Secretary of the Treasury and the Alaska Commercial Company.

Sixth. Protection of the seal fishery:

In the matter of protecting the seal fishery, the North American Commercial Company will furnish and maintain at their own cost a properly built steam launch, of suitable size, to be kept at said islands and to be used by the agents of the Government, when desired, in the discharge of their official duties and the protection of the interests of the Government. Said company will at all times during the life of the lease, by a careful compliance with all laws and regulations pertaining thereto, and in all other proper and authorized ways, exercise due diligence in protecting said seal fishery and industry from detriment of any kind.

Seventh. American industry:

In view of the fact that most of the seal skins taken in America are also consumed by our people, and the fact that the dressing and dyeing of seal skins are admittedly as well done here as anywhere in the world, there appears to be reason in the public demand that our own  
178 citizens be permitted to compete on terms of equality for this industry. The spirit and intent of the statute also seem to be unmistakable in this respect. In response thereto this company will, if awarded the lease, guarantee that the industry of unhairing, dressing, dyeing, and otherwise handling the fur-seal skins to be taken under such

lease shall be, in good faith, open to American labor, skill, and capital—and that under conditions which shall be fair to all interests and shall involve no derangement or detriment to an established business. Sufficient proof of the sincerity of this company in this regard is furnished by the \* fact already stated that one of their number is at the head of the leading house in America for dressing and dyeing fur-seal skins—a house of more than half a century's successful experience, of ample financial strength, and enjoying the highest repute at home and abroad for the perfection of their work.

This proposal is made by authority of the board of directors of this company, with a full knowledge of the laws of Congress relating to the leasing of the seal privilege of St. Paul and St. George islands in Alaska, and with the full intent to abide by and carry out in good faith all their provisions, and with the full purpose of transacting the business and discharging the trust in such manner as to command the approval of the Government and promote the welfare of the people of Alaska.

Very respectfully,

NORTH AMERICAN COMMERCIAL COMPANY  
(OF ILLINOIS).

[L. S.] By HENRY L. TURNER, *Its President*.

Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

179 No. 10. The North American Commercial Company, New York and San Francisco, by J. Liebes, president.

*Proposal for leasing seal islands made by the "North American Commercial Company."*

FEBRUARY 20TH, 1890.

To the honorable the SECRETARY OF THE TREASURY OF THE UNITED STATES,  
*Washington, D. C.*

SIR: Whereas heretofore, to wit, on or about the 24th day of December, A. D. 1889, the Honorable William Windom, Secretary of the Treasury, did advertise for proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska, which advertisement is in the words and figures following, to wit:

*"Proposal for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska.*

"TREASURY DEPARTMENT,  
*"Washington, D. C., December 24, 1889.*

"The Secretary of the Treasury will receive sealed proposals until twelve o'clock noon on the 23rd day of January, 1890, for the exclusive right to take the seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States. In addition to the specific requirements of said statutes, the successful bidder will be required to provide a suitable building for a public school

on each island, and to pay the expense of maintaining schools thereon during a period of not less than eight (8) months in each year, as  
 \*20 may be required by the Secretary of the Treasury.\* Also to pay  
 to the inhabitants of said islands for the labor performed by them  
 180 such just and proper compensation as may be prescribed by the  
 Secretary of the Treasury.

"The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury in accordance with the provisions of law. The right is reserved to reject any and all proposals not deemed to be in accordance with the best interests of the United States and of the inhabitants of said islands. As a guaranty of good faith each proposal must be accompanied by a properly certified check, drawn on a United States national bank, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand dollars (\$100,000). The check of the successful bidder will be retained and forfeited to the United States unless he execute the lease and bond required by law. Proposals should be addressed to the Secretary of the Treasury, Washington, D. C., and indorsed 'Proposals for leasing seal islands.'

(Sig.)

"WILLIAM WINDOM,

*"Secretary of the Treasury."*

And whereas on or about the 20th day of January, 1890, the Secretary of the Treasury, by further notice and advertisement, extended the time for receiving such proposals until twelve o'clock noon Friday, the 21st day of February, 1890:

Now, therefore, the North American Commercial Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, in the United States, and having its principal place of business in the city and county of San Francisco, in said State of California, all of whose stockholders and directors are citizens of the United States, and the officers as well as some of its directors being familiar with the fur business and the taking and preserving of the skins of fur-bearing animals on the Pacific Coast, makes the following

181 proposal or bid for the exclusive right to take fur seals upon the islands of St. Paul and St. George, in the Territory of Alaska, for the term of twenty years from and after the 1st day of May, 1890, and to send a vessel or vessels to said islands for the skins of such seals, the same being made under and in accordance with the subject to the terms, provisions, limitations, and conditions of chapter three, Title XXIII, of the Revised Statutes of the United States of America, and of all laws of the United States, and of all the decisions, rules, and regulations now in force or that have been or may hereafter be made or adopted by the Secretary of the Treasury in the premises or in relation thereto, and under and in accordance with and subject to all of the terms, provisions, limitations, and conditions of the advertisements and notices above set forth and referred to.

That is to say, the North American Commercial Company proposes to pay and will pay an annual rental of \$55,200 (fifty-five thousand two hundred dollars) for the lease of said islands of St. Paul and St. George and the revenue tax or duty of two dollars (\$2) laid upon each fur-seal

skin taken and shipped from said islands, and in addition thereto proposes to pay and will pay to the United States the sum of (\$8<sup>75</sup>/<sub>100</sub>) eight <sup>75</sup>/<sub>100</sub> dollars apiece for each and every fur-seal skin that shall be taken

and shipped from said islands of St. Paul and St. George by it,  
 \*21 \*in accordance with the terms and provisions of any lease that may be awarded to it, based upon this proposal. All such payment to be made in the lawful money of the United States at such times and places as may be designated by the Secretary of the Treasury.

Provided, however, and this proposal and bid is made upon the express condition and with the express understanding that the Government of the United States shall not by any act or regulation of the Secretary of the Treasury or otherwise, during the existence of any lease that may be so awarded, limit the fur-seal skins to be taken and shipped by the company from said islands to any number less than one hundred thousand skins per annum after the first year of the existence of such lease; such provision and condition to be made a part of such lease and binding upon the Government.

Or, if the Secretary of the Treasury deems it for the best advantage of the United States, having due regard to the interest involved, the North American Commercial Company proposes, in addition to the payment of \$55,200 per annum as annual rental for the lease of the said islands of St. Paul and St. George, and a revenue tax or duty of two dollars laid upon each fur-seal skin taken and shipped from said islands during the continuance of any lease that may be obtained; that it will pay unto the United States of America 45 per centum of all the gross receipts arising from the sale of any and all fur-seal skins that may be taken and shipped by it under and in accordance with the provisions of any lease that may be awarded to it, based upon this proposal, and that it will stipulate and agree that the said percentage of gross receipts, including the revenue tax or duty of two dollars will amount to at least the sum of eight dollars apiece on each fur-seal skin so taken and shipped by it, and that it will exceed by at least ten per cent (10%) during each year of the continuance of such lease the amount for each corresponding year of the highest and most favorable bid that may be made by any other responsible bidder in response to the advertisements and notices above set forth; settlements with the United States and payments of such sums and percentage to be made, unless otherwise directed by the Secretary of the Treasury, at the end of each and every year from the date and during the continuance of such lease, and the books, accounts, vouchers, and other papers of the company shall always be open to the inspection and verification of the United States or any of its  
 183 authorized officers or agents, and the company will bind itself to use its best efforts to sell said fur-seal skins so taken and shipped during each year during the continuance of such lease at the best possible advantage and at the highest price obtainable.

Provided always, and this offer of paying a percentage of the gross receipts, as aforesaid, is made upon the express condition and understanding that the Government of the United States shall and will not by any act or regulation of the Treasury Department or otherwise, during  
 \*22 the existence of any lease that may be awarded to it, limit the \*fur-seal skins to be taken and shipped by the company from said



islands, to any number less than one hundred thousand skins per annum after the first year of the existence of such lease, and this condition to be made a part of such lease, and binding upon the Government.

The North American Commercial Company also proposes, in the event it should obtain said lease, during the existence thereof, to pay fifty (50) cents per gallon for each gallon of oil made from seals that may be taken from said islands and sold by it; also to furnish free of charge to the native inhabitants of said islands of St. Paul and St. George annually such quantity or number of dried salmon as the Secretary of the Treasury may direct; also to furnish, under the direction of the Secretary of the Treasury, said native inhabitants the salt and barrels necessary for preserving fish and meat. It will also allow and pay to the Alaska Commercial Company, if it should so demand, a fair and reasonable price for all of the buildings or improvements erected or made on said islands by it, and for all implements used by it in its business, and that may be useful to said North American Commercial Company, or required by it in the operation of its lease; and that it will undertake and bind itself to operate any lease it may obtain in the interest of and for the benefit of American citizens. And, so far as may be practicable and consistent with the interests of said company, it will encourage the  
184 dressing, dyeing, and marketing of seal skins within the United States.

This proposal or bid is accompanied by a properly certified check on the Bank of New York, a national bank of the United States, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand dollars (\$100,000).

Should the foregoing proposal or bid be accepted, this corporation will at once make, execute, furnish, and deliver any and all undertakings and bonds, with good and sufficient securities, to the satisfaction of the United States, and the Honorable the Secretary of the Treasury, in such sums and upon such terms and conditions as may be required by law or by the Honorable the Secretary of the Treasury. In case this proposal or bid be accepted, this corporation will at once make the deposit of United States bonds, in the amount and as required by law, and will, at once, do and perform all such acts and things, and enter into, make, execute, acknowledge, deliver, deposit, accept, receive, take, register, and record any and all leases and indentures of lease, and any and all undertakings, bonds, contracts, agreements, covenants, checks, securities, documents, papers, or other instruments or writings that may be necessary or proper in the premises, and to carry out any and all of the objects or purposes herein mentioned or alluded to, or that may be required by the said United States or by the Honorable the Secretary of the Treasury thereof.

In witness whereof the North American Commercial Company  
\*23 has hereunto\* caused its corporate name and seal to be affixed, by its president thereunto duly authorized, and its said corporate seal to be attested by its assistant secretary, at the city and county of New York, State of New York, this 20th day of February, A. D. 1890.

[SEAL.]

NORTH AMERICAN COMMERCIAL COMPANY,  
By J. LIEBES, *President*.

Attest:

H. B. PARSONS,  
*Assistant Secretary*.

185 No. 11.—The North American Commercial Company, New York and San Francisco, by J. Liebes, president.

*Proposals for leasing seal islands made by the "North American Commercial Company."*

FEBRUARY 20th, 1890.

To the honorable the SECRETARY OF THE TREASURY OF THE UNITED STATES,  
Washington, D. C.

SIR: Whereas, heretofore, to wit, on or about the 24th day of December, A. D. 1889, the honorable William Windom, Secretary of the Treasury, did advertise for proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska, which advertisement is in the words and figures following, to wit:

*"Proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska."*

"TREASURY DEPARTMENT,  
Washington, D. C., December 24, 1889.

"The Secretary of the Treasury will receive sealed proposals until twelve o'clock noon on the 23rd day of January, 1890, for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States. In addition to the specific requirements of said statutes, the successful bidder will be required to provide a suitable building for a public school on each island, and to pay the expense of maintaining schools thereon during a period of not less than eight (8) months in each year, as may be required by the Secretary of the Treasury. Also to pay to the inhabitants of said islands for labor performed by them such just and  
186 proper compensation as may be prescribed by the Secretary of the Treasury.

"The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury, in accordance with the provisions of law. The right is reserved to reject any and all proposals not deemed to be in accordance with the best interests of the United States and of the inhabitants of said islands.\* As a guaranty of good faith, each proposal must be accompanied by a properly certified check drawn on a United States national bank, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand dollars (\$100,000). The check of the successful bidder will be retained and forfeited to the United States unless he execute the lease and bond required by law. Proposals should be addressed to the Secretary of the Treasury, Washington, D. C., and indorsed 'Proposals for leasing seal islands.'

(Sig.)

"WILLIAM WINDOM,  
Secretary of the Treasury."

And whereas, on or about the 20th day of January, 1890, the Secretary of the Treasury by further notice and advertisement extended the

time for receiving such proposals until twelve o'clock, noon, Friday, the 21st day of February, 1890.

Now, therefore, the North American Commercial Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, in the United States, and having its principal place of business in the city and county of San Francisco, in the State of California, all of whose stockholders and directors are citizens of the United States, and the officers, as well as some of its directors, being familiar with the fur business and the taking and preserving of the skins of fur-bearing animals on the Pacific Coast, makes the following  
187 proposal or bid for the exclusive right to take fur seals upon the islands of St. Paul and St. George, in the Territory of Alaska, for the term of twenty years from and after the first day of May, 1890, and to send a vessel or vessels to said islands for the skins of such seals, the same being made under and in accordance with and subject to the terms, provisions, limitations, and conditions of chapter three, Title XXIII, of the Revised Statutes of the United States of America, and of all laws of the United States, and of all the decisions, rules, and regulations now in force or that have been or may hereafter be made or adopted by the Secretary of the Treasury in the premises or in relation thereto, and under and in accordance with and subject to all of the terms, provisions, limitations, and conditions of the advertisements and notices above set forth and referred to.

That is to say, the North American Commercial Company proposes to pay and will pay an annual rental of sixty thousand dollars (\$60,000) for the lease of said islands of St. Paul and St. George, and in addition to the revenue tax or duty of two dollars (\$2) laid upon each fur-seal skin taken and shipped by it from said islands, said company will pay the sum of ( $\$7\frac{625}{1000}$ ) seven  $\frac{625}{1000}$  dollars apiece for each and every fur-seal skin that shall be taken and shipped from said islands of St. Paul and St. George under the provisions of any lease that it may obtain. All such payments to be made at such times and places and in such manner as the Secretary of the Treasury shall direct. In addition to said payments, said company stipulates and agrees that it will faithfully comply with all  
the laws of the United States, and all the rules and regulations of  
\*25 the Treasury Department in relation to the taking of fur \* seal skins on said islands, as also with all the terms, provisions, and conditions of the advertisements or notices for proposals above set forth and referred to.

The North American Commercial Company also proposes, in the event it should obtain said lease, during the existence thereof, to pay  
188 fifty (50) cents per gallon for each gallon of oil made from seals that may be taken from said islands and sold by it; also to furnish free of charge to the native inhabitants of said islands of St. Paul and St. George annually such quantity or number of dried salmon as the Secretary of the Treasury may direct; also to furnish, under the direction of the Secretary of the Treasury, said native inhabitants the salt and barrels necessary for preserving meat. It will also allow and pay to the Alaska Commercial Company, if it shall so demand, a fair and reasonable price for all of the buildings or improvements erected or made on said

islands by it, and for all implements used by it in its business and that may be useful to said North American Commercial Company or required by it in the operation of its lease; and that it will undertake and bind itself to operate any lease it may obtain in the interest of and for the benefit of American citizens. And so far as may be practicable and consistent with the interests of said company, it will encourage the dressing, dyeing, and marketing of seal skins within the United States.

This proposal or bid is accompanied by a properly certified check drawn on the Bank of New York, a national bank of the United States, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand dollars (\$100,000).

Should the foregoing proposal or bid be accepted, this corporation will at once make, execute, furnish, and deliver any and all undertakings and bonds, with good and sufficient securities, to the satisfaction of the United States and the honorable the Secretary of the Treasury, in such sums and upon such terms and conditions as may be required by law or by the honorable the Secretary of the Treasury. In case this proposal or bid be accepted, this corporation will at once make the deposit of United States bonds, in the amount and as required by law, and will at once do and perform all such acts and things, and enter into, make, execute, acknowledge, deliver, deposit, accept, receive, take, register, and record any and all leases and indentures of lease, and any and all undertakings, bonds, contracts, agreements, covenants, checks, securities, documents, papers, or other instruments or writings that may be necessary or proper in the premises, and to carry out any or all of the objects or purposes herein mentioned or alluded to, or that may be required by the said United States or by the honorable the Secretary of the Treasury thereof.

In witness whereof the North American Commercial Company has hereunto caused its corporate name and seal to be affixed by its  
 \*26 President, \*thereunto duly authorized, and its said corporate seal to be attested by its assistant secretary, at the city and county of New York, State of New York, this 20th day of February, A. D. 1890.

NORTH AMERICAN COMMERCIAL COMPANY,

[SEAL.]

By J. LIEBES, *President*.

Attest:

H. B. PARSONS, *Assistant Secretary*.

No. 12. The North American Commercial Company, New York and San Francisco, by J. Liebes, president.

*Proposals for leasing seal islands, made by the "North American Commercial Company."*

FEBRUARY 20TH, 1890.

To the honorable the SECRETARY OF THE TREASURY OF THE UNITED STATES,

Washington, D. C.

SIR: Whereas heretofore, to wit: On or about the 24th day of December, A. D. 1889, the Honorable William Windom, Secretary of the

190 Treasury, did advertise for proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska, which advertisement is in the words and figures following, to wit:

*"Proposals for the privilege of taking fur seals upon the islands of St. Paul and St. George, Alaska.*

"TREASURY DEPARTMENT,  
"Washington, D. C., December 24th, 1889.

\* "The Secretary of the Treasury will receive sealed proposals until twelve o'clock noon, on the 23rd day of January, 1890, for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States. In addition to the specific requirements of said statutes, the successful bidder will be required to provide a suitable building for a public school on each island, and to pay the expenses of maintaining schools thereon during a period of not less than eight (8) months in each year, as may be required by the Secretary of the Treasury.

"Also to pay to the inhabitants of said islands for labor performed by them such just and proper compensation as may be prescribed by the Secretary of the Treasury. The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury in accordance with the provisions of law. The right is reserved to reject any and all proposals not deemed to be in accordance with the best interests of the United States and of the inhabitants of said island. As a guaranty of good faith each proposal must be accompanied by a properly certified check drawn on a United States national bank, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand  
\*27 dollars \*(100,000) The check of the successful bidder will be  
191 retained and forfeited to the United States unless he execute the lease and bond required by law. Proposals should be addressed to the Secretary of the Treasury, Washington, D. C., and indorsed 'Proposals for Leasing Seal Islands.'

(Sig.) "WILLIAM WINDOM,  
"Secretary of the Treasury."

And whereas on or about the 20th day of January, 1890, the Secretary of the Treasury, by further notice and advertisement, extended the time for receiving such proposals until twelve o'clock noon, Friday, the 21st day of February, 1890.

Now, therefore, the North American Commercial Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, in the United States, and having its principal place of business in the city and county of San Francisco, in said State of California, all of whose stockholders and directors are citizens of the United States, and the officers as well as some of its directors being familiar with the fur business and the taking and preserving of the skins of fur-bearing animals on the Pacific Coast, makes the following proposal or bid for

the exclusive right to take fur seals upon the islands of St. Paul and St. George, in the Territory of Alaska, for the term of twenty years from and after the first day of May, 1890, and to send a vessel or vessels to said islands for the skins of such seals, the same being made under and in accordance with and subject to the terms, provisions, limitations, and conditions of chapter three, Title XXIII of the Revised Statutes of the United States of America, and of all laws of the United States, and of all decisions, rules, and regulations now in force, or that have been or may hereafter be made or adopted by the Secretary of the Treasury in the premises or in relation thereto, and under and in accordance with and subject to all of the terms, provisions, limitations, and conditions

192 of the advertisements and notices for proposals above set forth and referred to.

That is to say, The North American Commercial Company propose to pay and will pay to the United States an annual rental of \$57,100 (fifty-seven thousand one hundred dollars) for the lease of said islands of St. Paul and St. George, and in addition to the revenue tax or duty of two dollars (\$2) laid upon each and every seal skin taken and shipped from said islands it will pay the sum of (\$8.25) eight  $\frac{25}{100}$  dollars apiece for each and every fur-seal skin that shall be so taken and shipped from the said islands of St. Paul and St. George by it under and in accordance with the provisions of any lease that may be awarded to it based upon this proposal, all such payments to be made in lawful money of the United States at such time and places as may be designated by the Secretary of the Treasury.

In addition to said payments, said company hereby agrees that it will comply with all the laws of the United States, and all the rules and

\*28 regulations of the Treasury Department in relation to the taking\* of fur seals on said islands, as also with all the terms, provisions, and conditions of the advertisements or notices for proposals above set forth and referred to. Provided, however, and it is understood, that this proposal and bid is made and submitted upon the express condition and understanding that during the existence of said lease the Government of the United States shall and will at all times guarantee and protect the said North American Commercial Company in the peaceable, quiet, and exclusive possession of said islands of St. Paul and St. George for the purpose of taking fur seals therefrom, and that it will protect the fur-seal fisheries in and within the said islands, and in and within the waters of Alaska known and designated as the "Behring Sea," so that the said company may at all times have and enjoy the exclusive rights,

193 privileges, benefits, and profits of such fisheries, and these conditions to be made a part of such lease and binding upon the Government.

The said North American Commercial Company also proposes, in the event it should obtain said lease, during the existence thereof, to pay fifty (50) cents per gallon for each gallon of oil made from seals that may be taken from said islands and sold by it; also to furnish free of charge to the native inhabitants of said islands of St. Paul and St. George annually such quantity or number of dried salmon, and such quantity of firewood as the Secretary of the Treasury may direct; as also to furnish under the direction of the Secretary of the Treasury said native inhabitants the salt and barrels necessary for preserving meat. It will also



allow and pay to the Alaska Commercial Company, if it should so demand, a fair and reasonable price for all of the buildings or improvements erected or made on said islands of St. Paul and St. George by it, and for all implements used by it in its business that may be useful to said North American Commercial Company in the operation of its lease; and that it will undertake and bind itself to operate any lease it may obtain in the interest of and for the benefit of American citizens. And so far as may be practicable and consistent with the interests of said company it will encourage the dressing, dyeing, and marketing of seal skins within the United States.

This proposal or bid is accompanied by a properly certified check, drawn on the Bank of New York, a national bank of the United States, payable to the order of the Secretary of the Treasury, in the sum of one hundred thousand dollars (\$100,000).

Should the foregoing proposal or bid be accepted, this corporation will at once make, execute, furnish, and deliver any and all undertakings and bonds, with good and sufficient securities, to the satisfaction of the United States, and the honorable the Secretary of the Treasury, in such  
 194 sums and upon such terms and conditions as may be required by law or by the honorable the Secretary of the Treasury. In case this proposal or bid be accepted, this corporation will at once make the deposit of the United States bonds, in the amount and as required  
 \*29 by law, and will\* at once, do and perform all such acts and things and enter into, make, execute, acknowledge, deliver, deposit, accept, receive, take, register, and record any and all leases and indentures of lease and any and all undertakings, bonds, contracts, agreements, covenants, checks, securities, documents, papers, or other instruments or writings that may be necessary or proper in the premises, and to carry out any and all of the objects or purposes herein mentioned or alluded to, or that may be required by the said United States or by the honorable the Secretary of the Treasury thereof.

In witness whereof the North American Commercial Company has hereunto caused its corporate name and seal to be affixed, by its president thereunto duly authorized, and its said corporate seal to be attested by its assistant secretary, at the city and county of New York, State of New York, this twentieth day of February, A. D. 1890.

[SEAL.]

NORTH AMERICAN COMMERCIAL COMPANY,  
 By J. LIEBES, *President*.

Attest:

H. B. PARSONS, *Assistant Secretary*.

195

#### PLAINTIFFS' EXHIBIT 3.

This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890:

Witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North Ameri-

can Commercial Company for a term of twenty years from the first day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following, that is to say:

To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur-seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period

196 of twenty years, and to secure the prompt payment of the sixty thousand dollars rental above referred to the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

That it will also furnish to the said inhabitants eighty tons of coal annually and a sufficient number of comfortable dwellings in which said native inhabitants may reside, and will keep said dwellings in proper repair, and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper school for the education of the children on said islands, the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury, and will also provide and maintain a suitable house for religious worship, and will also provide a competent physician or physicians and necessary and proper medicines and medical supplies, and will also provide the necessities of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

197 The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to

perform, and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall adjudge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The said company further agrees that it will not permit any of its agents to keep, sell, give, or dispose of any distilled spirits or spirituous liquors or opium on either of said islands or the waters adjacent thereto to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

It is understood and agreed that the number of fur seals to be  
198 taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1st, 1891, shall not exceed sixty thousand.

The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same at any time on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals or concerning the islands of St. George and St. Paul or the inhabitants thereof.

In witness whereof the parties hereunto have set their hands and seals the day and year above written.

(Signed)

WILLIAM WINDOM,  
*Secretary of the Treasury.*

NORTH AMERICAN COMMERCIAL COMPANY.

(Signed)

By I. LIEBES,  
*President of the North American Commercial Company.*

[Seal North American Commercial Company,  
incorporated December, 1889.]

Attest:

(Signed)

H. B. PARSONS,  
*Assistant Secretary.*

PLAINTIFF'S EXHIBIT 4.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., May 27, 1891.

Major W. H. WILLIAMS,  
*Special Treasury Agent, care of Revenue Cutter "Rush."*

199 SIR: Having been appointed as Treasury agent in charge at the seal islands, you are instructed to secure by personal application at the Department and from other sources, and in such manner as you may deem proper, as full information as is practicable on the subject of your duties.

You are required to leave Washington in time to leave San Francisco to proceed on the United States revenue cutter "Rush," which has orders to sail on the 27th of May for the islands of St. Paul and St. George. Mr. Nettleton, one of the Treasury agents for the islands, came down last fall after the season's work was over, and will return with you on the cutter. He will be accompanied by Mrs. Nettleton, who goes to teach the school upon the island where her husband may be stationed.

Upon arriving at the island you will at once assume charge of the interests and property of the Government and see to it that your authority is respected in all quarters. You will place Mr. Murray in charge of St. George and send one of the agents to aid him, the other remaining to assist you. In no event should either of the islands be left without a Treasury agent upon them.

It will be your duty to see that the lessees of the islands are permitted to take the quota of skins allowed them for the present year if male seal of the proper size come upon the rookeries in sufficient numbers to enable them to do so without causing permanent injury to the herds, and to secure to the natives all the comforts and privileges to which they are entitled under the provisions of the lease. The perpetuation of seal life is the paramount issue of the Government and all concerned.

The catch to be taken during the season of 1891 is hereby affixed at sixty thousand, and the standard or minimum weight of skin is placed at five pounds.

The killing season will begin as soon after your arrival as in your judgment the rookeries are in proper condition for driving, and the time for taking seal is left entirely to your discretion, with the exception that no seal are to be taken during the stagy period, which is understood to embrace the time between the 10th of August and the 30th of September. You should, however, have no difficulty in determining this, as the natives are well informed as to the peculiarities of seal life, and as the skins are much less valuable when taken during the process of shedding of the hair the company will not wish to secure them in this condition.

200 If the seal are present of proper size and in such numbers as to permit without permanent injury to the herd the company's taking the "catch," as stated, you will allow them to do so, and you are to use your best judgment in determining when the season will close. Should the maximum number for the year not be secured before the stagy season

begins, and in your opinion seal of proper size can be taken after it is over without harm to the rookeries, you are authorized to permit the company to resume killing with a view to filling the quota. The catch of sixty thousand or such lesser number as may be taken should be apportioned between the two islands. The original law mentioned 75,000 for St. Paul and 25,000 for St. George; later, changed by order of the Secretary of the Treasury to 85,000 for St. Paul and 15,000 for St. George; and you may follow this ratio or change it as the circumstances may require, taking care that in any event not more than 15,000 are killed upon the island of St. George.

The Department desires you to make careful daily examination during the sealing season as to the habits, numbers, and conditions of the seal and seal rookeries, with a view to reporting from your observation and such knowledge on the subject as you may have whether in your opinion the seals are diminishing, and, if so, the causes therefor. Comments upon any other matters of interest pertinent in this connection which you think proper to make will not be out of place.

201 The care and welfare of the natives are matters which should receive your careful attention, and among your most important duties is the insistence that the North American Commercial Co. shall fulfill all the obligations of their lease towards these people. The Government maintains a protectorate over them, and they look to its agents to see that their employers, the lessees, carry out in good faith all that they promise. It will be within your province to learn the prices charged at the company's stores and to compare them with the prices at San Francisco, and to report to the Department whether the natives are charged more than a fair sum for the articles sold them. The supplies provided should also be inspected as to quality and quantity, and if deficient, notice of the fact should be sent to the Department. The instructions of the agent last year were such that he felt compelled to stop the killing when the company had taken but 21,000 skins, and it is not believed that the money earned by the natives in killing this number of seal was sufficient to provide them with the amount of food required above what is furnished by the company under its lease and to buy the necessary clothing which they need in addition to that which they make from skins. In view of the increased market value of skins since the lease to the present company and the large per cent of profit derived, together with the reduced "catch," which lessens the opportunity for earning enough for their subsistence, it has been determined by the Department, and is hereby ordered, that the compensation to be paid to the natives for killing, salting, curing, and loading the seal skins on board the North American Commercial Company's steamer shall be 50 cents for each skin for the year ending April 30th, 1892.

Before leaving the islands you will divide the total earnings of the natives for the season's "catch" among them according to their respective classifications, and make a report of such division, showing the amount apportioned to each native participating in the community fund, 202 transmitting with your report to this Department copy to be furnished you by the lessees.

The Department desires you to take an accounting of all the provisions furnished by the company (other than what is specified in the lease)

to the natives during the past winter and spring for which they were unable to pay, with a view to making some equitable settlement of the matter. It has been represented to the Department that the company has shown a disinclination to provide gratuitously for the widows and their children, the old and feeble among the inhabitants, those who by reason of age or infirmity are unable to work. The provisions of the lease in this regard are clear and explicit and require the company to take care of this class of people, and you will impress upon the company's agents the fact that this is as much a part of their contract as is the taking of seals.

It is believed that the practice of killing pup seal for food for the natives should cease. The flesh of the larger seal is said to be quite palatable and equally good for food. The law gives the natives the privilege of killing such young seal as may be necessary for their own food and clothing, but provides that such killing shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury. The skins of the pup seal are used for clothing and are of little value. You are instructed to make investigation as to the expediency and advisability of prohibiting the killing for any purposes of seal (except in special instances to provide clothing for the inhabitants), the skins of which will not be accepted by the company on their quota. Every little seal that the natives take, if not killed, would have the same chance as the rest to return the following year and in time become a source of revenue to the Government. You are authorized to take any steps which your judgment may dictate to carry out in whole or in part the suggestions herein advanced.

203 You will also use whatever endeavor is possible, by making known more generally the law on the subject, to prevent the killing of seal on the shores and in the vicinity of the Aleutian chain of islands. The natives there have petitioned the Department to permit them to take sufficient seal to furnish food and clothing for themselves and their families, but the law is imperative, and limits to the Pribylov group of islands the power of the Secretary to authorize the taking of seal.

The question of the depopulation of the islands of St. Paul and St. George is a serious one and demands attention. Through some false notions, said to have been inculcated among the natives by the church authorities on the island, they are not permitted to intermarry if there is between them the remotest degree of consanguinity, and even the relation of godfather or godmother is held to be sufficient to prevent a union. As the regulations prevent any male person from going to the islands to reside permanently, there is a dearth of young men, and the young women are more apt to find husbands elsewhere. The number of natives on the islands is greatly diminished, and each year laborers are taken there from Ounalaska and vicinity. It is understood that residence upon the Pribylov group of islands is considered by the Aleuts to be very desirable, and to insure a comparatively comfortable existence, which they do not always have in other parts of Alaska. You will therefore take into consideration the proposition to recruit the permanent inhabitants of the islands of St. Paul and St. George, by placing upon them next year a small number, ten or twenty, young men, or transferring to



these islands several families in which are a number of young men. It is thought that there will be no trouble in finding suitable persons willing to go there, and it may be well to canvass the matter among the people now living upon the islands and devise some way of making the selection. Care should, of course, be taken not to add to the number of sick or infirm persons already there, but the bringing of men from the Aleutian chain to remain for the season only has a demoralizing effect, both upon them and upon the permanent residents of the islands.

Enclosed are copies of the lease and laws under which it was made, and you are empowered to make any additions to the regulations already in force as may be necessary for the guidance of the officers of the Department, the company's agents, and the natives in the government of the islands.

The Government's agents should be as free as possible from dependence in any way upon the favor of the lessees, and to this end, where possible, they should live in the houses provided for them. The agents, when married men, should be encouraged to take their wives with them and to provide themselves as far as possible with facilities for keeping house. This would tend to a better state of discipline on the islands and offer most wholesome examples in the way of civilization to the inhabitants.

Mrs. Nettleton will accompany her husband, and you are hereby directed to place her in charge of one of the schools and to determine with the company fair compensation for her services, which will be paid by them in accordance with the terms of the lease. The schools will be maintained from September 1st to May 31st, and be open five days in the week, Saturday being regarded as a day of rest for the teacher and recreation for the children. It will be the principal duty of the teacher to instruct the children in acquiring a knowledge of the English language. Russian is not to be taught in the schools, and the church officers must be restrained from interfering with the children in acquiring a knowledge of English, and should be advised that they will only do harm if they attempt to thwart the purpose of the Government in having the children educated in the language of their country.

205 The North American Commercial Company, under their lease, have the exclusive privilege to trade in seal skins on the islands of St. Paul and St. George, and it is believed that the best interests of the natives will be subserved by excluding all traders from the islands. You will therefore regard it a special duty to see that fair prices are paid for all fur skins disposed of by the natives to the company.

You will, during the killing season, personally superintend on the ground, and while the lessees will have control and direction of the native labor while driving and killing, yet it must be remembered by all on the islands that you are the officer in charge, and if you discover any faulty methods, or can suggest any changes for the better prompted by humane or other considerations, you should not hesitate to direct such changes to be made, and the company's representatives are expected to carry out your suggestions in good faith and spirit.

You will endeavor to secure the good will and confidence of the native inhabitants of the islands, and advise them whenever practicable of their

rights and duties as American citizens, and by proper means try and increase their friendship for the Government and the people of the United States.

It is desired that you make a thorough examination of the houses of the natives and insist that the company shall make such repairs as are needed to render them comfortable. The question of an insufficient number of houses for the natives is one of importance and upon which information is required; suggestions are also invited as to improvements which can and should be made by the company to maintain and insure the health of the inhabitants. Hygienic and sanitary conditions should be looked into and recommendations made. You will use every endeavor and take all necessary precaution to secure the interests of the Government and of the inhabitants of the islands, and at the same time to protect the lessees in the enjoyment of all the rights and privileges granted to them under the lease.

206 In case of any difference or dispute between the natives and agents of the lessees in reference to any matter whatever, you will adjust in a fair and impartial manner, and both parties must abide by your decision.

When the sealing season is over, you will return to San Francisco on one of the United States revenue cutters if practicable, and come at once to Washington to submit your report. Before leaving the islands you will arrange to have a Treasury agent to remain on each of them during the winter.

These instructions apply to both islands, and a copy should be given the agent in charge of St. George for his guidance there.

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

PLAINTIFF'S EXHIBIT 5.

MAY 2, 1892.

Maj. W. H. WILLIAMS,  
*U. S. Treasury Agent.*

SIR: As already advised by telegram, you will proceed at once to the seal islands as "Treasury agent in charge," taking passage for that purpose either on the U. S. revenue steamer "Bear" which leaves Port Townsend on or about May 7th, or the Alaska Commercial Co.'s steamer "Bertha," which leaves San Francisco about the same date.

Upon your arrival at the islands you will assume charge of the interests and property of the Government, and as its representatives you will see to it that the authority with which you are invested is respected in all quarters.

It is not only desirable this season that the Department should have upon the islands at an early day a representative who is thoroughly familiar with the general condition of affairs concerning them; but, as you will see from the communication from General J. W. Foster  
207 that will reach you with this, you can be of material service in collecting information of importance in the preparation of the arbitration case now pending.

The State Department desires to receive this information at an early date, and in order to accomplish this, the "Bear" will be directed to trans-

port you between the two islands to enable you to secure the data, and the "Rush" will be instructed to convey you in the early part of June from the islands to Port Townsend, where you will telegraph your arrival, mail the data collected, and resume your duties on the coast pending further instructions.

On or about May 20th Mr. J. Stanley-Brown will leave San Francisco on the steamer St. Paul for Unalaska and the Pribilof Islands. Upon your leaving the islands Mr. Stanley-Brown will assume the duties of agent in charge and be guided by these instructions, which you will leave with him, together with letterpress copies of all information procured for the use of the State Department.

#### ASSISTANT AGENTS.

It is probable that Assistant Agents Joseph Murray and A. W. Lavender will accompany you on the "Bear," but if not they will report to you both for service and residence on the islands during the coming year. You will make such assignment to them to the respective islands as in your judgment seems best. Messrs. Barnes and Nettleton, now upon the islands, will continue to render service during the remainder of their stay, but have permission to return to the States as soon as relieved by Murray and Lavender. While permission is granted to avail themselves of the first conveyance, preference should be given, all things being equal, to a Government vessel, and instructions will probably be given to the "Rush" to bring them to Port Townsend in June.

At no time must the islands be left without a resident.

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#### MODUS VIVENDI.

You will find enclosed a copy of the modus vivendi between the United States and Great Britain, which you will see goes into force May 1, 1892, and continues while the arbitration is pending unless otherwise provided for after October 31, 1893.

#### FOREIGN AGENTS.

You will observe that the modus (Art. IV) permits the landing on the islands of British agents. In accordance with the international agreement, you will permit such duly accredited persons to land for the purposes indicated in the modus.

Your attention is called to the unfortunate representations made to Lord Salisbury last year by the British commissioners. Their statements concerning the alleged violation of the modus in the matter of seal killing were based upon their misinterpretation of the terms of the modus and their misunderstanding of the facts. Especial effort should be made therefore to present with exceeding clearness any fact that you may deem necessary or proper to communicate to any British official visiting either island. All affidavits obtained by such agents from the natives or other persons on the island must be taken in the presence of a Government officer, and the foreign agents must conform to such rules of conduct concerning the rookeries as are required of citizens of the United States.

## SEAL QUOTA.

It is essential to the carrying out of the modus that all seals taken for their skins be killed under the direction of the Government agent. No quota has therefore been assigned the North American Commercial Company. As the limit to be killed for all purposes during the season of 1892 is fixed by international agreement, 7,500, you will so adjust  
209 the killing as to provide for a fresh-meat supply for the natives throughout the season. As under the terms of the lease all skins taken will ultimately be turned over to the North American Commercial Company, you will confer with the agent of the lessees as to the kind of skins desired and request his cooperation in selecting them.

The number of seals to be killed on each island will be in about the proportion of former years, unless, in your judgment, there should be made some modification of the ratio.

## KILLING SEASON.

The killing season will begin as soon after your arrival as in your judgment the rookeries are in proper condition for driving, and the period of taking seals is left entirely to your discretion, with the exception that no seals are to be taken during the stagy season, which embraces the time between August 10th and September 30th.

## DRIVING OF SEALS.

As the perpetuation of seal life has always been and is now the paramount concern of the Government, and is also of the greatest interest to all persons connected with the seal industry, you will take especial care that no methods are permitted in the driving, killing, or general handling of the seals which in your opinion would directly or remotely by injuries to them or in any way jeopardize, even in the slightest degree, the increase of the seal herd.

## KILLING OF PUPS.

It was the custom in former years to permit the killing in the fall of a certain number of young seals for the natives' food and clothing. As the skins are not now used for the latter purpose, and as the carcass furnishes not more than eight pounds of meat when dressed, the value of the food  
210 supply thus contributed is not commensurate with the destructive effect which the killing of pups has upon the seal herd. No killing of pups during the coming year will therefore be permitted.

## COMPENSATION OF NATIVES FOR TAKING SKINS.

It has been decided by the Department that the compensation to be paid to the natives by the North American Commercial Company for driving, killing, salting, and curing the seal skins, and loading them on board the company's steamer, shall, for the year ending April 30th, 1893, be fifty cents for each skin accepted.

## DIVISION OF MONEY DUE NATIVES FOR TAKING SKINS.

Before leaving the islands you will divide the total earnings of the natives for the season's catch among them, according to such classification as you may deem fair and just, after conference with the company's agent and the natives, and make a report of such division, showing the amount apportioned to each native participating in the "community fund," accompanied by an endorsement from the company agents and the two head chiefs that such sums have been passed to the credit of the natives on the books of the company.

## KILLING OF SEALS ON THE ALEUTIAN ISLANDS.

You will use whatever endeavor is possible, by making known more generally the law on the subject, to prevent the killing of seals by the Aleuts on the shores or in the vicinity of the Aleutian Islands. While the Department would be glad to permit these natives to carry out their wishes, it is not possible to do so, as the law is imperative, and limits to the Pribilof group of islands the power of the Secretary to authorize the taking of seals.

## NATIVES.

211 The care and welfare of the natives are matters which should receive your careful attention. While it is not believed that the officers of the company desire other than the fullest compliance with their obligations, you are nevertheless expected to inform yourself as to whether there has been, either through thoughtlessness or carelessness, any neglect in conforming, both in letter and spirit, to those provisions of the lease referring to the natives. It is but just to all parties concerned that you acquaint yourself with the prices charged at the company's store, as compared with the prices charged in the San Francisco market; also the quality and quantity of the articles supplied.

## SALMON SUPPLY.

The attention of the company has been called to the fact that salt salmon was furnished, while the lease provides for dried. You will inform yourself as to what proportion of the salt fish supplied last year was not used; what amount of dried salmon were provided for the season, and what are the wishes of the natives, bearing in mind that they are sometimes changeable in their tastes.

## FUEL.

In addition to the 80 tons of coal furnished under the lease, contract has been made with the company to supply 220 tons additional, making a total of 300 tons—100 tons of which is for the use of St. George and 200 tons for the use of St. Paul. This coal must be distributed under the direct supervision of the Government officer on each island. By reason of this generous provision on the part of the Government it ought not to be necessary for the natives to make additional purchases of fuel.

## WIDOWS AND INDIGENTS.

Your especial attention is called to that clause of the lease which states that the company "will also provide the necessaries of life for the  
 212 widows, orphans, and aged and infirm inhabitants of said islands who are unable to provide for themselves," and you are informed that the Department understands that this clause includes widows and all other persons, regardless of age, sex, or condition of parentage, who are physically unable to provide for themselves. The "necessaries of life" referred to therein include fuel as well as clothing and subsistence.

## SANITARY IMPROVEMENTS, ETC.

Under that clause of the lease by which the company binds itself to exercise "all reasonable efforts to secure the comfort, health, \* \* \* and promote the morals and civilization of said inhabitants," the company have been asked to instruct their superintendent upon the islands to cooperate with the Government agent in determining the most effective method of improving the villages from a sanitary standpoint, both in the matter of furnishing a better water supply and in the removal from the immediate vicinity of the villages from time to time all excrementitious matter, the same, if possible, to be the subject of a joint report to the Department at an early date.

## MAINTENANCE AND EMPLOYMENT OF NATIVES.

As you are aware, there is an item in the pending sundry civil bill providing for the maintenance of the natives during the coming year. At the earliest possible moment you will be informed of the final action of Congress. The Department recognizes the injurious effect which the bestowal of this money as a charity would have upon the natives, and desires that the natives be employed as far as possible in return for the money received by them. The North American Commercial Company has therefore been requested to instruct their superintendent to join with you in preparing a report, first, as to a more effective method of guarding the islands—including a compensation to the natives for  
 213 watchman service; and second, what internal improvements of a simple nature can be undertaken that will furnish employment to the natives and prove advantageous to the administration of the island. Should you, as the agent in charge, find it expedient to put in operation during the coming year any of the suggestions to be presented in the contemplated report, you are authorized to do so and to decide upon an amount per diem to be paid the natives for any service rendered.

## NATIVES' SUPPLIES.

In view of the limited catch upon the islands there will undoubtedly be many for whom provision must be made during the year. In anticipation of this there is sent you herewith by the "Bear" two books of blank orders consecutively numbered, and all supplies which the company in the future furnish to natives whose accounts are exhausted must be upon such an order made out and signed by the Treasury agent, and this order



appended to the company's general account as a subvoucher and evidence of indebtedness. This will impose no extra clerical work upon the company's agents, as their general account will contain but one item—that is, the total amount represented by the accompanying subvouchers. The stub of the order must be retained by the agent, to be ultimately transmitted with his report to the Department.

#### TRANSLATION OF RUSSIAN RITUAL.

This Department is informed that there is in the hands of the North American Commercial Company the sum of \$1,500, which was contributed by the natives twelve years ago for the purpose of having their church service translated into English. It is the purpose of the Department to have this translation made, and to this end you will procure and transmit to the Department at your earliest convenience a copy of the service of the Græco-Russian Church.

#### 214 REDISTRIBUTION OF CHURCH SUBSCRIPTION.

The Department is also informed that there is now deposited with the North American Commercial Co. on St. Paul Island the sum of \$3,325 raised by the voluntary subscription of the natives for the benefit of their church. It is believed that the interests of the natives will be best subserved by redistributing this money to the original donors or returning it to the natives in such manner as your judgment, aided by a conference with the chief men of the village, will suggest. A full report concerning your action should be made to the Department.

#### SUBSISTENCE OF GOVERNMENT OFFICERS.

You are informed that arrangements have been made with the North American Commercial Company by which Government officers will be transported to or from the seal islands for \$100, and that subsistence, washing, &c., will be furnished them at the rate of \$5 per week while on the islands.

#### JANITOR.

Permission is given to employ a janitor for the Government house on each island, at a compensation of \$20 per month.

#### SCHOOL TEACHERS.

As Mrs. Nettleton, the present school teacher on St. George, returns to the States this spring, the company have been advised of the fact and requested to furnish a school teacher for the coming year. School will be maintained from September 1st to May 31st, and be open daily with the exception of Saturday and Sunday. It will be the particular duty of the teacher to assist the children in acquiring a knowledge of the English language. Russian is not to be taught in the schools, and church officers must be restrained from interfering with the education of  
 215 the children in a knowledge of English, and they should be advised that they will only do harm if they attempt to thwart the purpose and earnest desire of the Government to have the children instructed in the language of their country.

## FOX KILLING.

The North American Commercial Company under their lease have the exclusive privilege of trading in seal skins on the Pribilof Islands, and it has been the experience of the Department that the best interests of the natives will be subserved and much contention avoided if other trading is excluded. On the other hand you will regard it as your special duty to see that fair prices are paid for all fur skins disposed of by the natives to the company.

It is recognized that the fox skins, the taking of which is under the exclusive control of this Department, are an important source of income to the natives at this time, and permission is therefore given to permit them to kill such numbers of foxes on St. Paul and St. George Island as will not endanger their future increase. This can probably be best secured by regulating the time during which skins can be taken. The trading on the islands in skins by any officer of the Government for purposes of gain must not be permitted.

## AGENT'S REPORT.

There should accompany your report a schedule which should show (1) the day and hour of the drive, (2) the rookery driven from, (3) the daily killing, whether for food, or if for quota the number accepted or rejected, (4) the approximate size of the skins, (5) the approximate percentage rejected of those driven for killing, (6) the number that died by the way, (7) the character of the weather, and (8) a convenient summary of totals.

In addition to this, you will endeavor to prepare similar schedules from the present records on the islands, as well as a schedule embodying  
216 all information (that the records may show such as name of vessel, captain, owner, seals killed, disposition of vessels, etc.) concerning raids upon the islands, for transmission to Washington by first mail; one copy to be addressed to General John W. Foster, State Department, and one copy to the Secretary of the Treasury. If all of this information has not been recorded, as much of it should be sent as appears upon the record, and if entirely lacking for any given year that fact should be so indicated. This material will be useful both in the preparation of the arbitration case and in the perfecting of the Treasury files.

You will also secure any and all information concerning seal life which in your judgment can be made useful in considering the international question now pending.

A census of the islands should accompany your report, and a statement concerning the general health of the natives.

## EXCLUSION OF IMPROPER PERSONS.

Under the authority conferred upon the Secretary of the Treasury by section 1959 of the Revised Statutes you are authorized and directed to exclude from landing on or to remove from the Pribilof Islands any person or persons whom in your judgment come within the terms of this statute, and you are further directed to call upon any United States revenue cutter or other Government vessel to assist you in executing these instructions.

## OFFICERS VISITING THE ISLANDS.

Should any officer or officers of vessels performing service in Bering Sea desire to visit the islands you will extend to them any courtesies in your power. These gentlemen will readily appreciate the necessity of the Departmental restrictions concerning such matters as disturbing the rookeries, general trading with the natives, giving them liquor, visiting their houses except in the company of a Treasury officer, etc., as well as the requirement that seamen must be accompanied by an officer who, by reason of his position, is responsible for their conduct while on the islands.

## IN GENERAL.

You will endeavor to secure the good will and confidence of the native inhabitants of the island, and advise them whenever practicable of their rights and duties as American citizens, and by proper means try to increase their friendship for the Government and for the people of the United States, and to encourage them in all ways of uprightness, morality, and good living; but you will on no account seek to exert any influence which is subversive of their particular religious views.

In case of any difference or dispute among the natives, or between them and the agents of the lessees, in reference to any matter whatever you will adjust in a fair and impartial manner, and both parties must abide by your decision. In any difference of opinion that may arise between yourself and the agents of the lessees upon questions pertaining to the administration of the islands your decision must be final until the matter can be laid before the Department.

Inclosed are copies of the lease and laws under which it was made. You are empowered to make any additions to the regulations already in force as may be necessary for the guidance of the officers of the Department, the company's agents, and the natives, in the government of the islands. You will use every endeavor and take all necessary precaution to secure the interests of the Government and of the inhabitants of the islands, at the same time to protect the lessees in the enjoyment of all the rights and privileges granted to them under the lease.

These instructions apply to both islands and a copy should be given the agent in charge of St. George for his guidance.

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

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## PLAINTIFFS' EXHIBIT 6.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., April 26, 1893.

MR. JOSEPH B. CROWLEY,

*Special Agent in Charge of Seal Islands, Washington, D. C.*

SIR: Having been appointed Treasury agent in charge of the seal islands in Alaska, you are directed to proceed to San Francisco, California, so as to arrive there as early as the 10th proximo, and to take passage on the first available conveyance to the islands. Special Agents Hall, Adams, and Murray will accompany you, one of whom you will

assign to duty in charge of St. George Island to relieve Special Agent Lavender, who will return to his home by the first vessel leaving the islands. One of these agents will relieve Lieut. Ainsworth of the Revenue-Marine Service, who was temporarily detailed for duty on the island of St. Paul.

Upon arrival at the islands you will at once assume charge of the interests and property of the Government, and see to it that your authority as the chief representative of the Government there is properly respected.

Enclosed herewith you will find a copy of the contract between the United States and the North American Commercial Company, and it will be your duty to see that its provisions are enforced and that the rights of the Government and those of the lessees thereunder are duly protected.

Copy of the *modus vivendi* between the United States and Great Britain is also enclosed for your information, which, you will observe, continues in force pending the arbitration of the Bering Sea question, unless otherwise provided for after October 31st, 1893.

219 In accordance with the provisions of the *modus vivendi* the number of seals to be taken during the season of 1893 will be limited to 7,500. In taking this number you will permit no seals to be killed except those yielding good merchantable skins. The killing of pup seals for food for the natives or any purpose will not be permitted.

The killing season will begin as soon after your arrival as in your judgment the rookeries are in proper condition for driving, and the time for taking seals is left to your discretion, with the exception that no seals are to be taken during the stagy period, which is understood to be the period between the 10th of August and the 30th of September. It is believed that if the killing should be confined between the 1st of June and the 10th of August a better quality of skins would be obtained and less injury would be done to the rookeries. This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interests and those of the Government in the preservation of the fur seal being identical.

You will endeavor to cultivate and promote harmonious relations with the agents of the company with respect to affairs on the islands, taking care at all times that the provisions of the law and of the contract are faithfully observed. Should any disagreement arise between you and the company's superintendent with respect to the construction of the law or of the contract between the Government and said company, or upon any matter of administration on the islands, your decision must govern for the time being. But in all such cases you will require the superintendent to furnish you a statement in writing of his views upon the question involved, which you will submit to the Department with your annual report.

The Department desires you to make a thorough examination during the sealing season as to the habits, numbers, and condition of the  
220 seals and seal rookeries, the result of such observations to be embodied in your annual report.

The care and welfare of the natives will receive your careful attention, and you will see that the lessees shall perform all the obligations of their contract towards these people. You will ascertain the prices charged at the company's stores and compare them with prices at San Francisco,

and will report any instances where the natives are compelled to pay more than a fair price for articles sold them, and you will also inspect the articles supplied as to quality and quantity, and if deficient you will report the fact to the Department.

The compensation to be paid by the company to the natives for killing, salting, and lading the seal skins on board the company's steamer will be fifty cents (50c.) for each skin taken from the islands during the season. The money thus earned constitutes a community fund, and is to be divided among the natives according to their respective classifications. This division may be made by the company subject to your approval, and you will transmit with your report a schedule showing the apportionment with the name of each person sharing therein.

Under previous instructions from this Department a system was adopted by which orders are made upon the company for supplies necessary for the support of the native inhabitants. This system will be continued by you. An appropriation of \$19,500 was made by Congress for the current fiscal year for the support of the natives, and the same amount has been appropriated for the coming fiscal year. Careful accounts will be kept both upon the islands of St. Paul and St. George of the articles furnished in order that you may be able to certify the bills of the company therefor. The supplies to be furnished will be confined to the substantial means of subsistence. The funds appropriated will probably fall short of the amount needed for necessities, and the natives should not be permitted to buy at the company's stores expensive luxuries.

221 You will endeavor to secure the co-operation of the agents of the company in enforcing economy in these expenditures.

The Department has arranged with the North American Commercial Company to deliver to the islands two hundred ninety (290) tons of coal in addition to the eighty (80) tons which they are required to furnish under the terms of the lease. This will be a supply of three hundred seventy (370) tons for all purposes on the islands of St. Paul and St. George for the ensuing fiscal year.

You will take account of the coal to be so furnished by the company and cause it to be divided as follows, unless in your judgment a different division should be made in the interest of the natives:

#### ON ST. PAUL ISLAND.

For the Government House.....	10 tons
For the use of the natives.....	240 tons

#### ON ST. GEORGE ISLAND.

For the Government house.....	10 tons
For the use of the natives.....	110 tons

Total.....	370 tons
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The schools upon each of the islands of St. Paul and St. George are to be maintained from Septem' 1st to May 1st, and are to be open five days in the week. It will be your duty, and that of the agents who may be assigned to the islands during the winter, to see that the teachers appointed by the company are competent to teach the English language and that they faithfully perform this duty.

The North American Commercial Company under its lease has the exclusive privilege to trade in seal skins on the islands of St. Paul and St. George, and you will see that no other persons are allowed to trade with the natives for peltries of any kind.

222 It is understood that the number of blue foxes on the islands has greatly decreased. For the benefit of the natives, to whom fox skins have been heretofore a source of considerable income, you will take such measures, in cooperation with the agents of the lessees, as in your judgment may be deemed best to restrain the wholesale killing of foxes during the winter. It is believed that, if the foxes could be trapped in such a way as to prevent their injury and all females so caught turned loose, such a course would tend to increase the supply of these valuable animals, and you are authorized to take such measures as may seem best to promote this end. The lessees have the exclusive privilege of purchasing these skins from the natives, and you will inform yourself as to their value and will fix a fair price for them to be paid by the company to the natives.

Visitors who may come upon the island will not be permitted to trade with the natives, and no unauthorized person will be allowed to land them upon the islands. Under no circumstances will visitors be allowed to go upon the rookeries, as it is understood that miscellaneous visiting by unauthorized persons is injurious to the seal herd.

You will be personally present upon the grounds during the killing season, and support the officers of the company in securing faithful work by the natives.

You will endeavor to secure the good will and confidence of the native inhabitants, and advise them of their rights as American citizens, and by proper means endeavor to increase their friendship to the Government and people of the United States.

You will give careful attention to the sanitary condition of the villages and houses of the people, and will require the company to make such repairs to the dwellings as are needed from time to time to make them comfortable.

It is not intended that the appropriation of Congress for the care of these people shall be disbursed to them entirely as a gratuity, but 223 they will be expected, as an equivalent therefor, to perform such services as you may elect, such as guarding the rookeries, making roads, repairing dwellings, unloading and delivering coal for their use, and carrying into effect such other measures as you may deem advisable for the improvement of the sanitary condition of the villages and general health of the natives. The work thus performed, however, must not be regarded as relieving the company from their obligation under the lease to employ the natives for such work upon the islands as they are fit to perform at a fair and just compensation, and to contribute all reasonable efforts to secure the friendship, health, education, and promote the morals and civilization of such native inhabitants.

It is understood that many of the natives use sugar to make quass, and then indulge in drunkenness and disorderly conduct.

As the chief representative of the United States on the islands it will be your duty to correct these evils and punish offenders against good order and good morals on the islands. The mode of accomplishing this must be left to your sound judgment, but such measures as may be



adopted must be of a mild corrective character, and must in no case be harsh or oppressive.

When it is established that a man or woman has made quass from the sugar supplied them, the further issue of sugar to such persons should be restricted or entirely cut off, but care should be taken to avoid punishing the innocent members of a family by such deprivation on account of the misuse of sugar by one of their number.

A copy of these instructions will be furnished by you to the agent to be placed in charge of St. George Island, and to the agent who may be at any time placed in temporary charge of St. Paul Island, for their guidance. You will make such assignment of the assistant agents as you

may deem best, but neither the island of St. George nor St. Paul must be left at any time without the presence of a special agent.

Respectfully, yours,

C. S. HAMLIN.

*Acting Secretary.*

PLAINTIFFS' EXHIBIT 7.

[Telegram.]

TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

Washington, D. C., May 27, 1891.

Major W. H. WILLIAMS,

*Special Agent, care of revenue-cutter "Rush," San Francisco, Cal.:*

The "Rush" will receive orders to sail to-day. You and the other agents will take passage on her. The "Corwin" will follow in a few days. By her will be forwarded to you full instructions. The memorandum copy of proposed instructions which you now have will be your guide until "Corwin" arrives. Maximum number is yet to be determined, and other modifications are probable. If seventy-five hundred seal are taken before "Corwin" arrives you will stop killing and await instructions. See that the other agents take passage with you.

CHARLES FOSTER, *Secretary.*

Charge Treasury Dep't.

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PLAINTIFFS' EXHIBIT 8.

TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

Washington, D. C., June 18, 1891.

Mr. NOAH L. JEFFRIES,

*Attorney North American Commercial Company, Washington, D. C.*

SIR: In accordance with your request, I enclose herewith for your information copy of telegrams dated the 27th ultimo and 15th instant to Special Agent W. Williams, and copy of instructions dated the 27th ultimo to the same officer, all relating to his duties as special agent for this Department in charge of the seal islands in Alaska. The number of seals which your company will be permitted to take during the current year is limited to 7,500.

Respectfully, yours,

O. L. SPAULDING,

*Acting Secretary.*

(Three enclosures.)

PLAINTIFFS' EXHIBIT 9.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., June 15, 1891.

Agent WILLIAMS,

*Seal Islands, care Collector of Customs, San Francisco, Cal.*

Your instructions and copy of proclamation announcing agreement between the United States and Great Britain will be handed to you by commander of the "Corwin."

If in any way your instructions are inconsistent with the proclamation, be governed by the latter.

CHARLES FOSTER, *Secretary.*  
L. G. S.

Charge Treas'y Dept.

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PLAINTIFFS' EXHIBIT 10.

[Printed heading.]

WASHINGTON, D. C., November 15, 1893.

To the SECRETARY OF THE TREASURY.

SIR: On behalf of the North American Commercial Company, the lessee of the right to take fur seals for their skins in Alaska, I have the honor to state that the adoption by the United States of the "regulations" suggested by the Tribunal of Arbitration at Paris, so as to prohibit the killing of fur seals by this company on the islands of St. Paul and St. George, in Alaska, authorized by law and its contract with the United States, would result in serious loss to the company and to the Government.

The seals taken by the lessee are those known as young "bachelors." They do not haul up on the rookeries, and are not required for the purpose of propagation; and, owing to the destruction of females by pelagic sealing and other causes, there is a vast preponderance of male seals on the islands.

These animals are polygamous in their habits. The male seals, known as "bulls," haul up on the rookeries and established their so-called harems on the rocks, each having from 2 or 3 to 25 females. On this account there is a comparatively small proportion of the males required for the purpose of procreation.

It is therefore manifest that, owing to the fact that the number of males greatly exceed the number of the females, and that, for breeding purposes, the required number of the former is less than one-tenth the number of the latter, and there is no diminution of the herd by taking a reasonable number of surplus male seals that are not permitted to go upon the rookeries.

227 This fact is demonstrated by an experience of 20 years under the former lease. From 1870 to 1890 the Alaska Commercial Company each year (except one, when only 75,000 were taken on account of the condition of the market) took 100,000 seals without any perceptible diminution of the herd until poachers began the wholesale slaughter of females.

The lessee kills no female seals, nor any under the age of two years. The killing is conducted in strict accordance with the law and the Treasury regulations, and is under the personal supervision of the Treasury agent. No seals are killed by the lessee except for their skins, and for every one so killed the Government receives its proper tax and bonus, and the skins of all seals taken are counted on the quota.

On the other hand, by pelagic sealing the poacher secures but a small proportion of those he kills, for the reason that most of them sink in the water and can not be recovered. His catch consists chiefly of female seals, and, in most instances, of those carrying their unborn pups.

If sealing were prohibited for a period of years, as suggested by the Tribunal of Arbitration, the natives of these islands would be deprived of the subsistence to which they have been accustomed, and Congress would be compelled to appropriate money for their maintenance; whereas during the entire period of the former lease these natives were abundantly supplied with all necessities and comforts from this industry alone. If this company were permitted to take one-half, or even one-third, of the number of seals that the poachers kill in defiance of law, there would be no necessity of Congressional appropriations for the support of these people, and the Government would annually receive as revenue more than a quarter of a million dollars.

The object of the proposed "regulation" is to preserve seal  
228 life. The interests of the United States is to rehabilitate the rookeries, which can be accomplished only by prohibiting the slaughter of female seals and their pups by the pelagic sealers. The killing of a reasonable number of bachelor seals on the islands does not in any degree diminish the permanent supply, as there are thousands of them in excess of the number required for breeding purposes that never go upon the breeding grounds.

The lessee has expended a large amount of capital in establishing this business, and it pays a high price for the privilege. The poachers pay no tax or license and defy the laws of both countries.

During the present year this company, in strict compliance with the orders of the Treasury Department, restricted its catch to 7,500. It costs the company substantially as much to take this number as a full quota, but it obeyed the law and regulations of the Department and made no complaint.

The poachers, on the other hand, have placed on the market this year 95,000 skins in defiance of both Governments, and in spite of the combined fleets which patrolled Alaskan waters for the sole purpose of preventing pelagic sealing.

The same result would follow if the proposed regulation were adopted; for if the poachers could evade and defy the authorities of both Governments under the *modus vivendi*, they would pay small heed to the regulations.

For these reasons, on behalf of the lessee, I respectfully ask that said regulations be not agreed to by the Government of the United States.

Very respectfully,

N. L. JEFFERIES,  
*Atty. for N. A. Com. Co.*

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PLAINTIFF'S EXHIBIT 11.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., May 12, 1894.

Mr. LLOYD TEVIS,  
*President North American Commercial Company, San Francisco, Cal.*

SIR: I have to inform you that there is due from your company as lessees of the seal islands of Alaska for the year ended April 1, 1894, the sum of \$132,187.50, the items of said account being as follows:

Rental .....	\$60,000.00
Tax on 7,500 seals, at \$2.00 each.....	15,000.00
Bonus on 7,500 seals, at \$7.625 each.....	57,187.20
	132,187.50

You are requested to take the necessary measures for the prompt payment of the amount above stated.

Respectfully, yours, J. G. CARLISLE, *Secretary.*

230 EXHIBIT 12. (Offered by plaintiffs, with limitation stated.)

N. L. Jeffries.

Wm. E. Earle.

[Law office of Jeffries & Earle, counsellors at law, 1417 G st. NW.]

[Special attention given to business in the Supreme Court of the United States, the Court of Claims, and the Land Court.]

WASHINGTON, D. C., May 25, 1894.

To the SECRETARY OF THE TREASURY.

SIR: The North American Commercial Company begs leave to acknowledge the receipt of your letter of May 12, 1894, demanding payment of the sum of \$132,187.50 on account of alleged indebtedness of said company under its lease of the right to take fur seals for their skins during the season of 1893.

In reply said company respectfully represents that during the entire year from May 1, 1893, to May 1, 1894, the right of said company to take fur seals in Alaska, as authorized by its contract with the Secretary of the Treasury on behalf of the United States, was withheld and denied, and said company was by the Government prohibited from taking any fur seals during said year, which was a direct violation by the United States of the stipulations and covenants of said lease, without any default on the part of said company. By the terms of said contract no indebtedness could accrue to the United States from said company except for taking and shipping fur-seal skins from the islands mentioned in the lease, and said company having been prevented by the United States  
231 from taking any seal skins during said year it can not be lawfully chargeable for moneys agreed to be paid on condition when that condition had not been performed.

By reason of the failure of the United States to perform its contract during said year said company sustained damages in the sum of \$318,300.

The company admits that by permission of the United States it did receive from the natives of the seal islands 7,500 skins of fur seals taken

during said year by said natives for food, for which it paid to said natives the sum of fifty cents per skin; and said company is willing and hereby offers to credit the United States for the privilege of shipping said skins from said islands with such sum as the same was reasonably worth.

The company, however, desires to avoid all differences or contention with the United States; and in order to reach an amicable settlement of the claim named in your letter, upon due consideration and by advice of its counsel, it has determined to offer to the United States the sum of \$23,789.50 in cash and to execute a release of all its claims for damages sustained by reason of the violation of the terms of its lease in the manner above set forth. This company makes the offer in good faith, believing it to be fair and just to both parties and in accordance with the uniform decisions of the Department under like conditions since the year 1870.

Very respectfully,

THE NORTH AMERICAN COMMERCIAL COMPANY.

By N. L. JEFFRIES,

*Its Attorney.*

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DEFENDANT'S EXHIBIT 13.

OFFICE OF SPECIAL AGENT TREASURY DEPARTMENT,

*St. Paul Island, Alaska, May 19, 1893.*

J. C. REDPATH, Esq.,

*Local Agent, N. A. C. Co., St. Paul Island, Alaska.*

SIR: I would inform you that I shall kill seals for food for the natives at 8.30 a. m. to-day.

You will be permitted to choose those skins you desire, and your cooperation is requested in selecting them.

Respectfully, yours,

D. J. AINSWORTH,

*2d Lieut., U. S. R. M., Acting U. S. Treasury Agent.*

DEFENDANT'S EXHIBIT 14.

OFFICE OF SPECIAL AGENT TREASURY DEPARTMENT,

*St. Paul Island, Alaska, June 1, 1893.*

J. C. REDPATH, Esq.,

*Local Agent, N. A. C. Co., St. Paul Island, Alaska.*

SIR: I would inform you that I shall kill seals for food for natives at 8.15 a. m. to-day.

You will be permitted to choose those skins you desire, and your cooperation is requested in selecting them.

Respectfully, yours,

D. J. AINSWORTH,

*2d Lieut., U. S. R. M., Acting U. S. Treasury Agent.*

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DEFENDANT'S EXHIBIT 15.

This indenture, in duplicate, made this third day of August, A. D. eighteen hundred and seventy, by and between William A. Richardson, Acting Secretary of the Treasury, in pursuance of an act of Congress

approved July 1st, 1870, entitled, "An act to prevent the extermination of fur-bearing animals in Alaska," and the Alaska Commercial Company, a corporation duly established under the laws of the State of California, acting by John F. Miller, its president and agent, in accordance with a resolution of said corporation duly adopted at a meeting of its board of trustees held January 31st, 1870, witnesseth:

That the said Secretary hereby leases to the said Alaska Commercial Company, without power to transfer, for the term of twenty years from the first day of May, 1890, the right to engage in the business of taking fur seals on the islands of St. George and St. Paul, within the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

And the said Alaska Commercial Company, in consideration of their right under this lease, hereby covenant and agree to pay for each year during said term, and in proportion during any part thereof, the sum of fifty-five thousand dollars into the Treasury of the United States, in accordance with the regulations of the Secretary to be made for this purpose under said act, which payment shall be secured by deposit of United States bonds to that amount; and also covenant and agree to pay annually into the Treasury of the United States, under said rules and regulations, a revenue tax or duty of two dollars upon each fur-seal skin taken and shipped by them, in accordance with the provisions of the act aforesaid, and also the sum of sixty-two and one-half cents for

234 each fur-seal skin taken and shipped, and fifty-five cents per gallon for each gallon of oil obtained from said seals for sale on said islands or elsewhere, and sold by said company. And also covenant and agree, in accordance with said rules and regulations, to furnish, free of charge, the inhabitants of the islands of St. Paul and St. George annually during said term twenty-five thousand dried salmon, sixty cords firewood, a sufficient quantity of salt, and a sufficient number of barrels for preserving the necessary supply of meat.

And the said lessees also hereby covenant and agree, during the term aforesaid, to maintain a school on each island, in accordance with said rules and regulations, and suitable for the education of the natives of said islands, for a period of not less than eight months in each year.

And the said lessees further covenant and agree not to kill upon the island of St. Paul more than seventy-five thousand fur seals, and upon the island of St. George not more than twenty-five thousand fur seals per annum; not to kill any fur seal upon the islands aforesaid in any other month except the months of June, July, September, and October of each year; not to kill such seals at any time by the use of firearms or other means tending to drive the seals from said islands; not to kill any female seal or any seal less than one year old; not to kill any seal in the waters adjacent to said islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain.

And the said lessees further covenant and agree to abide by any restriction or limitation upon the right to kill seals under this lease that the act prescribes or that the Secretary of the Treasury shall judge necessary for the preservation of such seals.

And the said lessees hereby agree that they will not in any way sell, transfer, or assign this lease, and that any transfer, sale, or assignment of the same shall be void and of no effect.



And the said lessees further covenant and agree to furnish to the several masters of the vessels employed by them certified copies of this  
 235 lease to be presented to the Government revenue officers for the time being in charge of said islands, as the authority of said lessees for the landing and taking of said skins.

And the said lessees further covenant and agree that they, or their agents, shall not keep, sell, furnish, give, or dispose of any distilled spirits or spiritous liquors on either of said islands to any of the natives thereof, such person not being a physician and furnishing the same for use as medicine.

And the said lessees further covenant and agree that this lease is accepted subject to all needful rules and regulations which shall at any time or times hereafter be made by the Secretary of the Treasury for the collection and payment of the rentals herein agreed to be paid by said lessees for the comfort, maintenance, education, and protection of the natives of said islands, and for carrying into effect all the provisions of the act aforesaid, and will abide by and conform to said rules and regulations.

And the said lessees, accepting this lease with a full knowledge of the provisions of the aforesaid act of Congress, further covenant and agree that they will fulfill all the provisions, requirements, and limitations of said act, whether herein specifically set out or not.

In witness whereof the parties aforesaid have hereunto set their hands and seals the day and year above written.

[SEAL.]

WILLIAM A. RICHARDSON,  
*Acting Secretary of the Treasury.*

Executed in presence of—

J. H. SAVILLE,

[SEAL.]

ALASKA COMMERCIAL COMPANY.  
 By JNO. F. MILLER, *President.*

#### AMENDMENT TO LEASE OF 1870.

Whereas, by a certain indenture made August third, eighteen  
 236 hundred and seventy, between William A. Richardson, then acting Secretary of the Treasury, and the Alaska Commercial Company, a corporation duly established under the laws of the State of California, it was covenanted and agreed as follows, to wit:

"And the said lessees further covenant and agree not to kill upon said island of Saint Paul more than seventy-five thousand fur seals, and upon the island of Saint George not more than twenty-five thousand fur seals per annum; not to kill any fur seal upon the islands aforesaid in any other month except the months of June, July, September, and October of each year; not to kill such seals at any time by the use of firearm or other means tending to drive the seals from said islands; not to kill any female seal, or any seal less than one year old; not to kill any seal in the waters adjacent to said islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain."

Now this indenture, made this twenty-fifth day of March, eighteen hundred and seventy-four, by and between William A. Richardson, Secretary of the Treasury, in pursuance of an act of Congress approved

March 24, 1874, and entitled "An act to amend an act to prevent the extermination of fur-bearing animals in Alaska, approved July first, eighteen hundred and seventy," and the said Alaska Commercial Company, lessees in said indenture of August third, eighteen hundred and seventy, acting by John F. Miller, its president and agent, in accordance with a resolution of said corporation adopted at a meeting of its board of trustees held January 31, A. D. 1870, witnesseth that the parties hereto do hereby mutually agree to rescind and annul, from and after the ratification hereof, the within-recited covenant in said indenture of August third, eighteen hundred and seventy, and in place thereof the said Alaska Commercial Company, lessees as aforesaid, do hereby covenant and agree not to kill upon the island of Saint Paul more than  
 237 ninety thousand fur seals, and upon the island of Saint George not more than ten thousand fur seals per annum; not to kill any fur seal upon the islands aforesaid in any other month except the months of June, July, August (from the first to the fifteenth of said month), September, and October of each year; not to kill such seals at any time by the use of firearms or other means tending to drive the seals from said islands; not to kill any female seal, or any seal less than one year old; not to kill any seal in the waters adjacent to said islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain.

And the said parties hereto, by virtue of the act of Congress herein referred to, hereby agree that the covenant set forth in said indenture of August 3, 1870, and herein recited, shall, from and after the ratification of this indenture, be revoked and rescinded, and the covenant hereby entered into shall be and remain in force as the covenant of the parties hereto in this regard, from and after the ratification hereof, during the remainder of said lease of August third, eighteen hundred and seventy.

In witness whereof the said parties have hereto set their hands and seals the day and year above written.

[L. S.]

WILLIAM A. RICHARDSON,  
*Secretary of the Treasury.*

[L. S.]

LEWIS GERSTLE,  
*Vice-President, Acting President Alaska Commercial Company.*

We, the obligors in a certain bond, dated August 3, 1870, given in accordance with the provisions of an act of Congress approved July 1, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska," hereby consent to the within change made in a lease given by the Secretary of the Treasury to the Alaska Commercial Company under said act, dated August 3, 1870, and agree that said  
 238 change shall not discharge us from any liability under said bond.

Witness our hands and seals this twenty-fifth day of March, eighteen hundred and seventy-four.

JOHN PARROTT.  
 LEWIS GERSTLE.

TREASURY DEPARTMENT,  
*Washington, D. C., May 9, 1874.*

SIR: I have received from the collector of customs at San Francisco a contract prepared in this Department, which has been signed by myself,

as Secretary of the Treasury, and by Lewis Gerstle, as vice-president of the Alaska Commercial Company, which was executed on the 25th of March, 1874, and as an agreement that the said company may kill 90,000 fur seals upon the island of Saint Paul and 10,000 upon the island of Saint George.

It is necessary, however, to give validity to this contract, that the acting vice-president of the company should have authority from the company, by a vote of the board of directors, to execute this contract, and I will thank you to procure and forward to this office a formal ratification of the action of the vice-president in the matter.

I am, very respectfully,

WM. A. RICHARDSON, *Secretary.*

H. M. HUTCHINSON, Esq.,  
*Of Alaska Commercial Company, Washington, D. C.*

WASHINGTON, May 11, 1874.

SIR: I am in receipt of yours of the 9th instant, requiring the Alaska Commercial Company to forward to the Treasury Department its  
239 formal ratification by a vote of directors of the contract executed by its vice-president on the 25th of March, 1874, by which it is agreed that the said company may kill 90,000 fur seals on the island of Saint Paul and 10,000 on the island of Saint George.

In reply, I have the honor to state that your communication has been forwarded to the Alaska Commercial Company, and that at its regular annual meeting in June next the ratification will be duly made and certified to the Treasury Department.

Very respectfully, your obedient servant,

H. M. HUTCHINSON.

HON. W. A. RICHARDSON,  
*Secretary of the Treasury.*

WASHINGTON, D. C., June 20, 1874.

SIR: I have the honor to transmit copies of the following papers, viz:

First. A resolution of the board of directors of the Alaska Commercial Company, ratifying the agreement executed by Lewis Gerstle, esq., vice-president of the said company, with the Secretary of the Treasury, March 25, 1874, under the authority of the act approved March 24, 1874.

Second. A letter of instruction to H. W. McIntyre, agent of said company at Saint Paul and Saint George islands, Alaska, directing him to afford all proper facilities and information to Professor Elliott and Lieutenant Maynard in their examination of said company at said islands.

Third. A letter of instructions to the agents of said company in the Territory of Alaska, containing similar directions.

Very respectfully, your obedient servant,

H. M. HUTCHINSON.

HON. B. H. BRISTOW,  
*Secretary of the Treasury.*

240 RESOLUTIONS OF ALASKA COMMERCIAL COMPANY.

*Resolutions passed at the annual meeting of the stockholders of the Alaska Commercial Company, San Francisco, Cal., June 10, 1874.*

Whereas a certain agreement was made and entered into, in writing, between William A. Richardson, Secretary of the Treasury of the United States, pursuant to an act of Congress approved March twenty-fourth, eighteen hundred and seventy-four, entitled "An act to amend an act to prevent the extermination of the fur-bearing animals in Alaska, approved July first, eighteen hundred and seventy," and this company, through Lewis Gerstle, vice-president and acting president, by authority of this company, which agreement bears date the twenty-fifth day of March, eighteen and seventy-four; and whereas the Treasury Department at Washington desire evidence of the authority of said Gerstle to execute said contract on behalf of this company: Therefore,

*Resolved*, That the acts and doings of said Gerstle in signing said contract on behalf of this company, and attaching thereto the corporate seal of this company, be, and the same is hereby, ratified, affirmed, and in all respects made valid, and that the said agreement shall, at all times and in all places, be taken and held to be the act and deed of this company.

*Resolved*, That the secretary of this company be and is hereby directed to make and certify, under the corporate seal of this company, a copy of these resolutions, and to forward the same to the honorable Secretary of the Treasury.

[SEAL.]

E. NEWMAN,  
*Secretary Alaska Commercial Company.*

241 DEFENDANTS' EXHIBIT 16.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., April 13, 1891.*

To the NORTH AMERICAN COMMERCIAL COMPANY,  
*Mills Building, New York City.*

SIRS: The Department has had under consideration for some time past the subject of the taking of the seals by your company during the present season. From information in the possession of the Department and its command the conclusion has been reached that 60,000 will be the maximum number of skins to be taken during the present summer if the condition of the rookeries will permit and the seals are there of a proper size, the standard of which will be hereafter determined. Instructions will be written and supplied to the agents of your company in due time, and this letter is sent merely as a notification, in order that you may make the necessary preparations for the summer's catch.

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

DEFENDANTS' EXHIBIT 17.

WASHINGTON, D. C., March 22, 1892.

Hon. CHARLES FOSTER,

*Secretary of the Treasury.*

SIR: \* \* \* Said company therefore protests against the payment of any rental, tax, or bonus for the year 1891, for the reasons herein stated, and alleges that the losses it has sustained by reason  
242 of the failure of the United States to perform its covenants amounts to a much greater sum than the aggregate of rental, tax, and bonus now claimed by the Department on that account on said 12,251 seal skins shipped from the islands last season.

Respectfully,

THE N. AM. COM. CO.

By N. L. JEFFRIES, *Attorney.*

DEFENDANTS' EXHIBIT 18.

TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

Washington, D. C., March 25, 1892.

Hon. N. L. JEFFRIES,

*Attorney for the North American Commercial Company,*

*Washington, D. C.*

SIR: I inclose herewith copy of a report, dated the 2d instant, of Maj. William H. Williams, in charge of the seal islands, in relation to seal skins taken by the company represented by you during the year.

The recommendation of Agent Williams that the company be called upon for a settlement for the skins taken during the year named is approved, and I have therefore to request that the sum of one hundred and twenty-eight thousand four hundred and sixty-seven dollars and eight cents (\$128,467.08) for 13,482 skins be deposited with the assistant treasurer at New York by the North American Commercial Company on or before the 1st proximo.

Respectfully, yours,

O. L. SPAULDING,

*Acting Secretary.*

Given.

1 inclosure.

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DEFENDANT'S EXHIBIT 19.

N. L. Jeffries,

Wm. E. Earle.

[Law office of Jeffries & Earle, counsellors at law, 1417 G st., NW., Washington, D. C.]

[Special attention given to business in the Supreme Court of the United States, the Court of Claims, and the Land Court.]

WASHINGTON, April 12, 1892.

Hon. CHARLES FOSTER,

*Secretary of the Treasury.*

SIR: I am instructed by the North American Commercial Company, the lessee of the right to take fur seals for their skins in Alaska, to present for payment by the United States its account for \$1,532,947.44, due to said company from the United States by reason of said company's having been prohibited by the United States during the years 1890 and 1891 from taking the number of fur seals on the islands of St. Paul and

St. George to which it was entitled under the law and its contract with the United States, dated March 12, 1890. It appears from the records of the Treasury Department that said company was authorized by the Secretary of the Treasury to take a quota of 60,000 seals for their skins during each of the years 1890 and 1891 under the subsisting contract between the United States and the lessee and in conformity with the law regulating the same.

It further appears from the records of the Treasury Department that the United States prohibited said company from taking its said quota of 60,000 in 1890 and said quota of 60,000 in 1891, and that the lessee was restricted to a quota of 20,995 fur seals in 1890 and to 13,482 in 1891. So that, instead of securing 120,000 in 1890 and 1891, the lessee received but 34,477 during both years.

Respectfully submitted.

THE NORTH AMERICAN COMMERCIAL COMPANY.  
By N. L. JEFFRIES, *Its Attorney.*

WASHINGTON, D. C., April , 1892.

The United States in account with the North American Commercial Company.

September 1, 1890.

To losses on account of being prohibited by the United States from taking 39,005 fur-seal skins on the islands of St. Paul and St. George, Alaska, which said company was authorized by law and by its contract with the United States to take and ship from said islands during the year 1890, at \$20.78 per skin..... \$810, 523. 90

September 1, 1891.

To losses on account of being prohibited by the United States from taking 46,518 fur-seal skins on the islands of St. Paul and St. George, Alaska, which said company was authorized by law and by its contract with the United States to take and ship from said islands during the year 1891, at \$15.53 per skin..... 722, 424. 54

Total..... 1, 532, 948. 44

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DEFENDANT'S EXHIBIT 20.

OFFICE OF THE ASSISTANT TREASURER, U. S.

No. 632.

Duplicate.

NEW YORK, June 18, 1892.

I certify that the North American Commercial Co. this day deposited to the credit of the general account of the Treasurer of the United States forty-six thousand seven hundred & forty-nine <sup>23</sup>/<sub>100</sub> dollars, amount due the United States from said company on account of rents, taxes, or other claims or demands to April 1, 1892, for which I have signed duplicate receipts.

E. H. ROBERTS,  
*Assistant Treasurer.*

\$46,749/23.

To be retained by the depositor.



## DEFENDANT'S EXHIBIT 21.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., June 27, 1892.

Hon. NOAH L. JEFFRIES,  
*Attorney for the North American Commercial Co.,*  
Washington, D. C.

SIR: The Department has received your letter of this date, in which you withdraw the protest of the North American Commercial Company which accompanied its deposit of the sum of \$46,749.23, in payment of rent and taxes under its lease of the Seal Islands in Alaska for the year ending April 1, 1892.

The Attorney-General having expressed the opinion that this Department is authorized to reduce proportionately the rental and bonus due from said company on a basis of a maximum catch of 100,000  
246 skins, the account has been adjusted as follows, in accordance with our verbal understanding, viz:

Tax on 13,482 at \$2.00.....	\$26,964.00
Rental on 13,482 at 60 cents.....	8,089.20
Bonus on 12,251 at \$0.9547.....	11,696.03
	<hr/>
	\$46,749.23

It is understood that this adjustment is accepted by said company as full settlement and satisfaction of all claims and demands against the United States for whatever cause to the date thereof, except only as to its right to claim any amount which may be awarded to it by the arbitrators appointed by Great Britain and the United States under the treaty of April 18, 1892.

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

## DEFENDANT'S EXHIBIT 22.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., April 25, 1892.

Hon. N. L. JEFFRIES,  
*Attorney, North American Commercial Company,*  
Washington, D. C.

SIR: I have to inform you that Articles I and II of the *modus vivendi*, signed on the 18th instant, provide as follows:

"Article I. Her Majesty's Government will prohibit, during the pendency of the arbitration, seal killing in that part of Behring Sea lying eastward of the line of demarcation described in Article No. 1 of the treaty of 1867 between the United States and Russia, and will  
247 promptly use its best efforts to ensure the observance of this prohibition by British subjects and vessels.

Article II. The United States Government will prohibit seal-killing for the same period in the same part of Behring's Sea, and on the shores

and islands thereon, the property of the United States (in excess of seven thousand five hundred to be taken on the islands for the subsistence of the natives), and will promptly use its best efforts to ensure the observance of this prohibition by United States citizens and vessels."

Your company will be governed accordingly.

Respectfully, yours,

O. L. SPAULDING,  
*Acting Secretary.*  
A. K. L.

DEFENDANT'S EXHIBIT 23.

[N. L. Jeffries, attorney at law.]

WASHINGTON, D. C., December 30, 1892.

Hon. CHARLES FOSTER,  
*Secretary of the Treasury.*

SIR: On behalf of the North American Commercial Company of San Francisco, I have the honor to request that the Department will furnish me with a statement of the amount due to the United States for the year 1892 for tax rentals, etc., under its lease of the right to take fur seals for their skins in Alaska.

Very respectfully,

N. L. JEFFRIES,  
*Attorney for the North American Commercial Company.*

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DEFENDANT'S EXHIBIT 24.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., January 11, 1893.

Hon. N. L. JEFFRIES,  
*Attorney for North American Commercial Company,*  
*Washington, D. C.*

SIR: In reply to your letter of the 30th ultimo requesting on behalf of the North American Commercial Company a statement of the amount due the United States for tax, rental, etc., under its right to take fur seals upon the seal islands by virtue of its lease for the fiscal year 1892, I have to inform you that the account stands thus—

7,549 skins, at 60 cents per skin, rental.....	\$4,529.40
7,549 " " \$2 " " int. rev. tax .....	15,098.00
7,549 " " \$7.625 " " bonus.....	57,561.13
Total .....	\$77,188.53

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

DEFENDANT'S EXHIBIT 25.

[Law Office of Jeffries & Earle, counsellors at law.]

WASHINGTON, D. C., January 12, 1893.

To the Hon. CHARLES FOSTER,  
*Secretary of the Treasury.*

SIR: On behalf of the North American Commercial Company of San Francisco, California, I have the honor to acknowledge receipt of  
249 a statement of the indebtedness of said company for the year 1892 under the provisions of its lease from the United States of the privilege of taking fur seals in Alaska.

The object of this communication is to point out an error in the computation of the amount of rental as set forth in the Department's statement, or rather the failure to reduce the amount of the entire rental in proportion to the reduction of the quota, as has been done heretofore and as required by the act of Congress authorizing said lease.

To be specific: The amount of rental charged to each seal skin has not been reduced, but is charged at the same rate as if the company had been permitted by the Department to take the lawful quota of 100,000 seals, whereas it has been restricted by the Department to 7,500.

It is unnecessary to inform the Secretary of the Treasury that this company has sustained damages to a very large amount by the action of the United States in prohibiting it from taking the number of seals that were available and which it was authorized by law and its contract to take. In its settlement of last year it gave to the United States a release of all claim for damages against the Government, and the account was adjusted, in accordance with law and the established precedents of the Department, by reducing the rental in proportion to the reduction of the quota.

The same basis of calculation will show the correct amount now due from said company to the United States to be \$23,972.60, which sum said company is prepared and willing to pay; and the North American Commercial Company hereby waives all claim for damages against the United States on account of its failure to secure the number of seals to which it was entitled by law and its contract, and said company further releases to the United States any and all claims to compensation for the damage and  
250 loss it has sustained up to and including the date of this communication on account of the destruction and waste of seal life by the subjects of Great Britain.

Very respectfully,

THE NORTH AMERICAN COMMERCIAL COMPANY.  
By N. L. JEFFRIES, *Its Attorney.*

DEFENDANT'S EXHIBIT 26.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., January 25, 1893.

Hon. N. L. JEFFRIES,  
*Attorney for the North American Commercial Company,*  
*Washington, D. C.*

SIR: In view of the representations contained in your letter of the 12th instant, with reference to the amount of indebtedness of the North

American Commercial Company under its lease for the privilege of taking fur seals in Alaska, I have decided to modify the letter addressed to you on the 11th instant, and the account of said company for the year 1892 will therefore stand as follows:

7,549 skins, at \$2.00 tax .....	\$15,098.00
7,549 " " 1.1756 rental.....	8,874.60

Total .....	\$23,972.60
-------------	-------------

Respectfully, yours,

CHARLES FOSTER, *Secretary.*

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DEFENDANT'S EXHIBIT 27.

OFFICE OF THE ASSISTANT TREASURER U. S.

No. 1303.

Duplicate.

NEW YORK, *Jan'y. 28, 1893.*

I certify that North American Commercial Co. this day deposited to the credit of the general account of the Treasurer of the United States twenty-three thousand nine hundred seventy-two  $\frac{60}{100}$  dollars on account of tax and rentals year 1892.

Letter of Department to N. L. Jeffries, attorney, Jan. 25, '93, for which I have signed duplicate receipts.

E. H. ROBERTS,  
*Assistant Treasurer U. S.*

\$23,972.60.

DEFENDANT'S EXHIBIT 28.

[Extract.]

OFFICE OF SPECIAL AGENT TREASURY DEPARTMENT,  
*St. Paul Island, Alaska, June 3, 1893.*

J. B. CROWLEY, Esq.,

*U. S. Treasury Agent in charge Seal Fisheries,  
St. Paul Island, Alaska.*

DEAR SIR:

\* \* \* \* \*

It was my intention not to kill seals before November 15th, so as to take as few stagy ones as possible, but November 10th a fresh gale from the northwest with frequent squalls of snow and hail threatened to drive the seals from the island, and there being a possibility of it continuing several days, seals were driven and killed the following day.

252 Towards night of the following day the weather, however, moderated. Besides killing seals near the village during the months of November and December, the watchmen at the different stations killed some for food.

Pursuant to instructions from the Department, the company were allowed to choose the skins they desired.

To be retained by the depositor.

In case of those killed for food of the watchmen, the men before leaving the village for the watchhouses were informed by the company's agent of the kind to kill. The last seals were taken at N. E. Point and for watchmen's food on the 16th of Dec.

Altogether seven hundred and eighty (780) fur seals were killed, of which number there died on the killing field one (1) pup, and on the road from the rookeries three seals. I weighed seven hundred and sixty-seven (767) of the above number at the salt house, used Fairbank's scales, and put twenty (20) on at a time when possible.

The following are the weights of the seven hundred and sixty-seven (767) fur seals, all of which were killed in November and December, 1892:

Large prime.		Medium prime.		Large stagy.		Medium stagy.	
Skins, weight, lbs.		Skins, weight, lbs.		Skins, weight, lbs.		Skins, wght., lbs.	
65	621	24	178	13	133	8	62
80	797	42	324	19	216	7	57
83	877	55	468	12	113	4	33
27	281	16	125	10	100	3	24
81	737	59	452	13	119	5	36
11	106	8	69	13	120	3	21
52	478	34	259			8	68
3	25	1	6				
8	74						
410	3,996	239	1,881	80	801	38	301
Average		Average		Average		Average	
9 306/410		7 208/239		10 1/80 lbs.		7 35/38 lbs.	

On May 19th drove seals for natives' food from Reef Rockery and killed 192, of which number 190 were prime and 2 skins cut.

June 1st made another drive from Reef Rockery for natives' food and killed 147, all of which were prime with the exception of one (1) small and one (1) cut. Besides those mentioned, 14 seals have been killed at the watchhouses for watchmen's food. This makes the total to date (June 3) taken this year three hundred and fifty-three (353). Of this number I weighed 348 at the salt house, put twenty (20) on at a time when possible, with the following result:

Large prime.		Medium prime.		Small.		Cut.	
Skins weight lbs.		Skins weight lbs.		Skins weight		Skins wght.	
252	2,619	92	734	1	7 lbs.	3	27 lbs.
Average 10 99/252		Av. 7 90/92		Av. 7.		Av. 9.	

Total number, 348. Total weight, 3,387.  
Average, 9 255/348.

Pursuant to instructions from the Department the company were allowed to choose the skins they desired, and the watchman before leaving for their watch stations were informed by the company's agent of the kind of seal to kill for food.

Comparing the number killed this year with the number mentioned on page 5 of this report, the total number killed by me while acting U. S. Treasury agent is seen to be eleven hundred and thirty-three (1,133).

\* \* \* \* \*

Respectfully, yours,

D. J. AINSWORTH,  
2 Lieut., U. S. A. M.

DEFENDANT'S EXHIBIT 29.

OFFICE OF SPECIAL AGENT, TREASURY DEPARTMENT,  
Nor. 20, 1893.

The Hon. SECRETARY OF THE TREASURY,  
Washington, D. C.

SIR: In pursuance of instructions given me at Department  
254 Apr. 26, 1893, I proceeded to San Francisco, Cal., arriving there May 10th, and on May 13th I sailed on the North American Commercial Company's steamer "Farallon" for the seal islands, accompanied by Assistant Special Agents Joseph Murray, E. T. Hall, and Thos. E. Adams.

We arrived at St. George Island June 1st, finding Agent A. W. Lavender in charge. I at once assumed the duties assigned me by placing Agent E. T. Hall in charge, relieving Agent Lavender, as directed. I arrived at St. Paul Island June 3rd, finding Lieut. D. J. Ainsworth in charge, whom I relieved by placing Agent Joseph Murray in charge until July 1st, at which time he was relieved by Thos. E. Adams, whose appointment took effect on that day.

Agents Lavender and Murray returned to their homes by the first available vessel leaving the islands after they had been relieved. Lieut. Ainsworth went aboard the cutter "Corwin" upon her arrival.

Upon my arrival at San Francisco I found a box addressed to me in care of the North American Commercial Company, containing nine volumes of Seal Island records, which I distributed on the islands St. Paul and St. George, respectively, as they belonged, according to directions in your letter of April 29, 1893.

From Agent Ainsworth I learned there were no seals killed on St. Paul between the dates December 16, 1892, and May 19, 1893. Agent Lavender informed me that there were none taken on St. George Island between the dates November 19, 1892, and May 20, 1893. There were none killed between these dates from the fact that the quota was filled.

When I arrived at the islands, the agents reported there were 1,133 seal skins salted to the Government credit, 784 of which were taken on St. Paul and 349 on St. George, these being skins taken from seals killed for native food during the fall of 1892.

255 Considering this number of skins to be on hand, I ordered that 6,367 seals be killed prior to the 10th day of August, 1893, thus furnishing the lessees the full quota, 7,500 skins, ready for shipment at the usual time, the last of August or the first of September. This leaves to be killed for native food during the months of October, November, and December the same number that was killed last fall, 1,133, this



number being necessary to fill the quota, 7,500, directed to be taken in 1893.

After visiting St. George Island, as early in July as was possible for me to obtain passage between the islands, and observing the condition of the rookeries and the number of seals thereon, in comparison with those of St. Paul, I directed that only 2,000 seals be taken on the island of St. George and that 5,500 be taken on the island of St. Paul during 1893.

While I have no question in my mind but that the actual number, 7,500, were taken and salted to the Government credit from the 20th day of October, 1892, up to the 12th day of August, 1893, yet the number of skins counted out of the salt house by myself and Agent Adams August 24, 1893, on St. Paul Island was 5,418, and as counted out by myself and Agent Hall on St. George Island August 26, 1893, was 2,007, making a total of 7,425 skins, leaving a shortage of 75 skins. Out of this shortage only 7 can be accounted for, which were small road skins killed in the several drives during the season, and the company rejected them and refused to take them from the island, so I gave them to the natives. This left an unaccountable shortage of 68 skins. A very remarkable coincidence is that this shortage all seems to occur on St. Paul Island, and from the best possible information to be obtained I find on this island an equal or greater shortage to have been an annual occurrence for years past. As to the taking of seals upon the islands from the 20th

256 day of October, 1892, to the 12th day of August, 1893, a daily journal or register was kept, showing the number of seals taken, the date of taking, the rookery from which they were taken, and the skins accepted and rejected by the lessees. (See Exhibits A and B.) A reference to Exhibit A will show that 5,313 prime skins were accepted, 52 undersize rejected, 121 stagy rejected, and 14 cut rejected. But the fact is that on the 24th of August, the day of shipment from St. Paul, Geo. R. Tingle, superintendent of the lessee's company, and myself overhauled the rejected undersized and cut skins, and out of the number formerly rejected by the local agent 23 were accepted as prime skins, leaving the actual number of undersized and cut skins rejected 36.

By reference to Exhibits A and B it will be seen that the killing of seals for food in fall of '92 on the island of St. George began on Oct. 20th and ended Nov. 19th, while on St. Paul it began on Nov. 11th and ended Dec. 16th. During this period out of 349 seals killed on St. George there was not a stagy skin found, while on St. Paul, although the killing began a month later and continued almost a month longer, out of 784 skins taken 121 were found to be stagy, some of these as late as Dec. 16th. I was unable to obtain a reasonable explanation for this state of affairs from any natural cause from the oldest and best-informed residents of the island.

There were a few seals seen at Northeast Point rookery on St. Paul Island as late as January 7, 1893. The first seals seen in the spring were a few bachelors swimming in the water close off Reef rookery on April 12th. At Zapadine, on St. Paul, the 27th day of April the first bulls hauled up. Bachelor seals began hauling up May 1st and cows were first noticed during the first days of June. The first pup discovered was on Reef rookery, on St. Paul Island, June 12th, by which time the cows were coming in pretty fast. It was observed that the pup

was born a few days after their arrival. It was plain to be seen that there was an ample number of bulls upon each island to serve all the cows that hauled up on the rookeries. Quite a number of bulls were observed on the several rookeries during the entire season unable to secure a single cow. It was not unfrequent to see harems formed of from 3 to 7 cows. The largest number observed in any one harem during the season that could be counted to a certainty was 37. As to the increase or decrease of the seal herd, I can only arrive at a conclusion from information obtained from Agent Murray, who has been on these islands the past four years, and from the native inhabitants, and from the condition and appearance of the rookeries and grounds covered by the seals this year as compared with former years. I think there is little change as to the increase or decrease of the seal herd from last year. As to the mortality of the seal herd during the season, there were but few grown seals found dead upon the rookeries. These were bulls whose death could be easily accounted for from the cuts and scars upon their carcasses. They had no doubt perished from the wounds received from encounters with other bulls while trying to establish their harems. On the 12th of July a terrific gale blew from the north and west, coming with such force that the waves dashed to unusual heights against the rookeries. After the surf had subsided, several dead pups were found, presumably killed by the surf beating and dashing them against the rocks before they were old enough to breast the tide. The greater number were found dead on Tolstoi rookery.

In taking the number, 5,500 seals, on St. Paul Island this season no drives were made from either Zapadine rookery or North East Point, as the required number was easily obtained where short drives could be made; and as these are two of the largest breeding rookeries on the island, I thought it advisable to give them absolute rest.

#### 258 THE CARE AND WELFARE OF THE NATIVE INHABITANTS OF THE ISLANDS.

The obligations of the North American Commercial Company under their lease was a matter to which I gave special attention. The widows and orphan children who lived with them I found well provided for as to food and clothing by the lessees. But another class of orphans, who had neither father nor mother, had been placed among other families on the islands who were not supported by the lessees. They were subjects for Government support, and these orphans in this way were being furnished food and clothing at Government expense, too. I at once obtained a list of the widows and orphans showing just who they were supporting as company charges. It is marked "Exhibit C." I then prepared a list of the widows and orphans whom I deemed proper subjects for their support under their lease, and presented the same to Mr. Geo. R. Tingle, superintendent of the company, which he accepted, agreeing to care for all those named, though under protest, a copy of the list and Mr. Tingle's protest being hitherto attached and marked "Exhibits D and E," the only occasion for protest upon the part of the lessees being that of furnishing support to the few widows and orphans having to their credit small sums of money left them. I insist from the reading of the

lease that the lessees are compelled to support all the widows and orphans upon the islands regardless of whether they may have personal means of support or not, while the lessees contend that they are only liable for the support of absolute pauper widows and orphans. Upon this question I respectfully request a ruling of the Department, that future trouble may not arise in this respect.

After becoming sufficiently acquainted with the natives on the island to be able to associate the proper names with the proper faces, I observed that one Maxim Krukoff, an imbecile, John Krukoff, 259 John N. Krukoff, George Kochergin, and Valerian Shaisnakoff, minors of tender years, had been placed upon the sealer's list and permitted to draw rations as such at Government expense. I thought this a mistake, so I served notice on the lessee's superintendent that these parties would be discontinued from the sealer's list and would revert to the company for their support, a copy of which notice is marked "Exhibit F."

#### DIVISION OF COMMUNITY FUND ON ST. PAUL AND ST. GEORGE ISLANDS.

Notwithstanding the fact that there was a shortage found in the skins taken and salted on St. Paul Island as compared with the count on the day of shipment, yet the division of the community fund was made upon the basis of the number as counted into the salt house, 5,500. This count, 5,500, at 50c. each, made a total of \$2,750.00, and was divided among the natives in first, second, third, and fourth classes as shows by report of division hereto attached and marked "Exhibit G." The division on the island of St. George was made upon the basis of the count of skins taken by the lessees from the islands. The number of skins, 2,007, at 50c. each, amounted to \$1,003.50, which was divided into four classes, as shown by report marked "Exhibit H." These divisions were made by the superintendent of the lessee's company, the chiefs of the respective islands, and myself.

#### BLUE-FOX SKINS, CATCH OF '92 AND '93.

On the island of St. George during the winter of 1892 and '93, there was caught by the natives 928 blue foxes, 7 of which were rejected by the lessees, leaving 921 prime skins, which were disposed of by the agent in charge to the lessees for \$2.00 apiece, making a total of \$1,842.00 to be distributed among the natives making the catch, as shown by 260 report marked "Exhibit I." On St. Paul Island there were 374 foxes taken by the natives, 337 of which were blue and 37 white. These were disposed of by Lieut. Ainsworth for the natives to the lessees for \$2.00 each for the 337 blue foxes and \$1.00 each for the white ones, making a total of \$711.00, which was credited to the parties making the catch in the same manner as is shown by the report of fox-fund distribution on St. George Island. (See Exhibit 1.)

I have ordered that the catch of blue foxes be limited to the month of Dec., 1893, and that the price fixed for the skins taken be \$5.00 apiece. The cause for limiting the time for one month for trapping was, in my judgment, necessary for the preservation of the foxes. It is suggested in my instructions in connection with the blue-fox trapping that if a

trap could be contrived in such a way as to prevent injury to the fox, and all females so caught turned loose, such a course would tend to increase the supply of these valuable animals. Such a method would certainly be an advantage if it were possible to carry it into effect. But at least two obstacles will be in the way of making this method a success: First, to invent a trap sufficiently large to hold a fox without doing him some bodily injury, and devising a plan to induce the wary fox into it; second, to take chances on the native trapper, who has probably tramped across the island from five to seven times a week through cold and snow knee deep, having convictions of honesty and courage enough when he comes to his trap and finds the only fox he has caught that week to be a female, to turn it loose. I advised, however, that this sort of box trap be tried as an experiment. To avoid the wholesale slaughter of foxes the better plan would be to adopt the rule of only trapping foxes every alternate winter until they have increased sufficiently to warrant a more frequent limited catch.

As to the mortality among the natives on the islands, I herewith submit copies of reports made by the physicians employed by the  
261 North American Commercial Company under their lease. It is marked "Exhibit J."

During the months June, July, and August, while I was upon the islands the health of the native inhabitants was good. The native sealers were ever ready and able to perform any and all such labors as they were called upon to perform, whether it was to drive and kill seals, work upon streets and roads, or to stand guard upon the rookeries day and night. No complaint was ever made by them. In the month of June they were provided with ample clothing to keep them comfortable in that cold, damp climate until the coming June. Beds and bedding were furnished families who had been sleeping on the floors, so far as it was possible to obtain them. It is a patent fact to all those who have noticed the condition of health and appearance of the natives the past few years since the Government has taken the matter in hand and furnished them with beds and compelled them to sleep upon them instead of on the floor, where they were subject to cold draught and dampness, and noxious vapors arising from the cesspools which served in lieu of privies, that this improvement of condition has had more to do with their present healthy condition than anything else.

During the fall of 1892 there were four privies, of four rooms each, built for native families on the island St. Paul, thus furnishing privies for sixteen families. These families soon became accustomed to the use of them, and took great pride in keeping them clean. For the bettering of the sanitary condition of the village, I would recommend that a privy be built for each native family on the islands. The island of St. George is wholly unprovided for in this respect. The natives are compelled to use a vessel in the house and dump the excrement in a wheelbarrow, which stands by the door until it is loaded ready to wheel away. It is either this or the practice of stepping out doors and being exposed to the gaze of the rest of the villagers, which is worse. This state of  
262 affairs does not tend toward civilization, nor to decency or morality. I do therefore urge the early correction of this evil by furnishing them privies.

## SCHOOLS UPON THE ISLAND.

Much has been reported by Treasury agents upon the subject of schools during the past twenty years. Many suggestions for their improvement have been made, yet the same system stands to-day as at the beginning. If it is the purpose of the Government to educate, enlighten, and civilize these people, some change in the school system will have to be made. I have no especial reason to censure the teachers employed on the islands for their apparent failure to teach the English to these children, neither is it the fault of the children on account of their dullness that they do not learn. It is in my opinion far more the fault of the parents, who get their incentive from the priest and church upon the islands, than either teacher or children. If these children were removed from their home influence and instructed by the same teachers, I am inclined to the belief that there would be more advancement in one year than there is under the present system in a whole school life time. I would therefore recommend a boarding school, in charge of a husband and wife who have had a successful experience in this line; or an industrial school for both boys and girls, teaching domestic industries. If, however, the present system must be continued, I most earnestly request that the school year begin on April 1st and continue eight months, thus giving the children the benefit of the long days and best season of the year, instead of short, dark, cold days of midwinter.

August 24th the information came to me from the superintendent of the lessee's company that a sum of money, between four or five hundred dollars, had been handed him by Father Rezoff, priest on St. Paul Island, with a request that he transfer the same to the authorities of the 263 Greek Catholic Church at San Francisco, Cal. This money had been gathered from the natives on the island during the past two years. I requested the superintendent to return this money to the priest, which he did, declining to remove the money from the island. Upon my arrival at St. George I was confronted by the same proposition. There was about \$300 on St. George Island. This sum was likewise refused to be taken from the island by the lessees. When I arrived at Dutch Harbor I requested Capt. Nicoll Ludlow, commander of the fleet, to instruct the captains of the several vessels doing patrol work about the islands not to convey said church funds from the islands. A copy of the letter enclosed, marked "Exhibit K."

Were these natives earning in their own right a sufficient sum of money to support themselves and not dependent upon the Government for their maintenance one might see some justice in their contributing a respectable portion of their earnings to their church on the islands; but in no instance should priests be allowed to send from the islands the money contributed for the support of the churches thereon. But inasmuch as the Government is furnishing the greater part of their support, the only money they handle being a possible \$4.00 to \$6.00 per week, given them for each week's subsistence during the time the community sealing fund lasts, it seems to me an outrage and an injustice that whatever part of this small pittance the priest may demand is forthcoming, though the family starve. Under the present condition of affairs on the islands every dollar that is taken from the native's portion of the community

sealing fund is virtually taken from the U. S. Treasury, for as soon as this fund is exhausted the Government furnishes the natives the means of subsistence. For this reason I directed that the money should remain on the islands until instructions could be obtained from your Department as to the proper disposition to be made of the same.

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## COAL SUPPLY.

In addition to the 80 tons of coal provided under the terms of the lease, the company furnished, under their special contract with the Government, 290 additional tons, making a total of 370 tons delivered at the islands. This was distributed as follows:

On St. Paul Island, for Government house .....	10 tons.
“ “ “ “ “ use of natives .....	250 “
On St. George Island, for Government house .....	10 “
“ “ “ “ “ use of natives .....	100 “

It was found at the time of delivering coal at St. George Island there was on hand about 15 tons of coal left from the supply of 1892. Considering this amount, I thought a hundred additional tons for the natives sufficient, and made the delivery accordingly.

While the quantity of coal was delivered by the company in accordance with their contract, the quality was anything but first-class, there being among it a large proportion of soft slack coal, which burns very rapidly and gives but little heat in return. At present there is no coal house upon either of the islands sufficient to hold the amount of coal delivered for the natives. The N. A. C. Co. this season furnished buildings on the island to shelter the greater part of the coal delivered. The remainder of the coal on St. Paul was put in a small building, arranged last season by the Treasury agents for the purpose of smoking seal meat, which proved to cure well, but was a failure in way of getting the natives to use the meat, so the building was converted into a coal house. The building furnished by the company on St. Paul, though the best they could do, was so open that it subjects the coal to about the same fall of rain and snow as if left out of doors.

I most earnestly urge the necessity of building a coal house on  
265 each of the islands, the one on St. George with a capacity of storing 150 tons, and one on St. Paul of 250 tons.

The issue of coal to the widows was a question on the islands again this season, it being contended by the lessees that the purpose of sending an additional amount of coal to the islands this year over former years was that the issue might be made by the Government to the widows, the same as to other native families. The opinion was likewise concurred in by Agent Murray, who made the requisition for the 50 additional tons of coal. After ascertaining that there was a sufficient amount delivered to warrant this issue to the widows, I ordered that the same be done, first obtaining an agreement from the lessees that should the Department not sustain the act of such issue, but on the contrary hold that the lessees should furnish the widows fuel, the amount of coal so issued should be returned next season to the islands free of charge. A copy of the agreement is hereto attached and marked "Exhibit M." I therefore submit the matter for permanent settlement by the Department.



## INTOXICATING LIQUORS AND QUASS.

Soon after our arrival at St. Paul Island and about the time the cargo of the "Farallon" was unloaded, some three or four of the natives were discovered to be under the influence of liquor. Agent Murray investigated where the liquor was obtained, and learned from the natives by their own confession that they got it from the assistant engineer on the company's steamer. As soon as this fact was learned by the captain of the "Farallon" his assistant engineer was discharged, and though the vessel returned to the island two trips afterwards, no intoxicants were obtained from it by the natives. As to quass brewing on the islands during the past winter and summer, there was but little of it indulged in. Agent

266 Ainsworth informed me that the native acted remarkably well in this respect during the winter while he was in charge. During my stay on the islands this summer there was but one notable evidence of a brew. This was on July 11th, St. Paul's Day, the great holiday among the natives as it is their island's name day. During that evening some of them became unusually good natured, none were otherwise, and all retired at a respectable hour that night, and were ready to resume labor early in the morning. In this respect the natives have certainly improved from what I can learn of their former life.

On the 29th of June the "Corwin" arrived at St. Paul Island, ready to do patrol duty. Cap't Munger called at the Government house and being informed that a vessel of no kind so far had been sighted from the islands returned the second day following to Dutch Harbor for coal. On the 4th of July a brig-rigged vessel was sighted a few miles to the westward of North East Point rookery. The watchman there telephoned its appearance to the village about noon. At 2 o'clock that afternoon some natives fishing discovered two sailboats near shore not far from S. W. Bay rookery and claimed to have heard shots fired from these boats. Accompanied by additional armed watchmen, Agent Adams and myself proceeded to N. E. Point and S. W. Bay, where we remained all night upon the rookeries. About sunset in the evening, the two sailboats that had been discovered near shore were seen returning to, the schooner then lying about four miles off to the westward between Zapadine and North East Point rookeries, where it lay until about 10 o'clock the following day, when it made a detour of the island, leaving in a southeasterly direction about 4 o'clock in the evening. On the 9th of July another schooner was sighted close inshore to the westward of village of St. Paul. At this time there was an exceedingly heavy fog. When the vessel was first discovered she was heading towards S. W. Bay rookery.

267 Additional guards accompanied by myself again went to the rookery. The watchmen at South West Bay reported to me when

I arrived there that the schooner came almost within gunshot reach from the rookery. It changed its course to the northwest and soon disappeared in the dense fog. These were the only evidences of the attempted raid or seal poaching on the seal islands during the season, notwithstanding newspaper reports to the contrary. In a few days after the appearance of the second schooner, Commander Nicoll Ludlow, of the warship "Mohican," arrived at the islands. He was informed of the appearance of the schooners, and from that time to the time of my departure from the islands there was no time but what there was one or more vessels of the

fleet doing active patrol duty around the islands. There was not a request made by a Treasury agent of the commander or captain of any vessel of the fleet, but what was granted with promptness and dispatch.

Captain Hooper, of the *Rush*, informed me that an order had been given that an armed boat's crew of marines in charge of an officer should be landed upon each of the islands, to remain in the villages as a "reserve guard." I do not consider a guard stationed thus in the villages of any value whatever toward protecting the rookeries. The native guard stands watch upon the rookeries from four to twelve miles from the village. They make faithful watchmen and are perfectly willing to perform this service. If a raid is attempted on the rookeries it is either during a dense fog or the darkness of night.

Before the watchmen on the rookeries could go to the village and alarm the officer of the marines, and they march to the scene of the raid, the poachers would have their boats loaded with seals and pulled away from the rookery, ready to be picked up by the schooner. If we are to keep a sufficient number of native watchmen on the rookeries, that a part of them can hold the raiders off while the "reserve guard" is being sent for, the same number of watchmen can hold them off for all time to come. Under competent direction the natives are able and willing to guard the rookeries, and are found to perform the service efficiently and thoroughly.

If a telephone line was constructed from North East Point and South West Bay rookeries on St. Paul, and Zapadine and East rookeries on St. George to the Government house on each of the islands, so the native watchmen could notify the Government agent of the appearance of a vessel when first sighted, that he might be in close communication with the watchmen, instructing them how and when to act, I have no fear of a successful raid ever being made again on the islands. The cost of the construction and maintenance of these lines would be nominal, as the natives could perform the greater part if not all the work of erecting and keeping them up after the material is once furnished.

In July commander Ludlow delivered to the agent on each of the islands 500 cartridges Nos. 45-70 for use of native watchmen.

#### STAGY REJECTED SKINS.

During the fall killing of 1892 there were 121 stagy skins taken on St. Paul Island. They were all rejected by the lessees. Having no instructions from the Department as to what disposition should be made of this class of skins, I permitted the lessees to take them, as well as the undersized skins rejected from the island, under promise that they would settle for same at the Department. I respectfully ask a ruling on this point: What shall be done with the stagy and undersized rejected skins in the future.

During the winter of 1892-93 a disagreement arose between agent Ainsworth and the company's local agent on St. Paul Island, which was carried to the extent that the Government agent was refused the privilege of the mess at the company house, compelling him to have his meals cooked and carried to him at the Government house by a native woman during the remainder of his stay on the islands. As to who was to blame in the matter will more fully appear in the report

of Lieut. Ainsworth to me, herewith submitted, to which I call attention for particulars. During the month Agent Ainsworth remained at the Government house after being relieved from duty he impressed me as being a pleasant, courteous gentleman. As a Government agent he certainly knew but one course; that was strictly in the line of his duty as laid down for him to perform.

I herewith submit a revised census of the seal islands up to date, June 30th, 1893. (Marked "Exhibit L.")

I have information from Agent Adams and Hall, on the seal islands, of date October 28, 1893, stating that no attempted raids had been made upon the islands, and that the guard had been reinforced on all the rookeries preparatory to the withdrawal of the fleet from Bering Sea Nov. 1st.

The health of natives on the islands remains good; the existing relations between the Government and the company agents being most amicable.

Respectfully submitted.

JOSEPH B. CROWLEY,  
*Chief, Treasury Agents.*

#### DEFENDANT'S EXHIBIT 30.

WASHINGTON, D. C., May 11, 1894.

HON. JOHN G. CARLISLE,  
*Secretary of the Treasury:*

SIR: The North American Commercial Company, in response to the demand for a settlement of the rents and taxes alleged to be due to 270 the United States from the company, under their lease for the exclusive privilege of taking fur seals in and about the islands of St. George and St. Paul for the years 1893-'4, say:

First. That by the terms of the lease they were entitled to the exclusive privilege of taking fur seals on said islands and in the waters adjacent thereto, which waters, at the time the lease was made, were understood to cover the one-half of Behring Sea, for a period of twenty years. That this right included and embraced as many fur seals as could be taken without diminution or detriment to the herd, and by statute which fixed at a maximum of 100,000 per annum. That the Secretary of the Treasury was only authorized to rent this privilege; that he was not authorized to make any other contracts except a contract for rents. That the \$7.62½ per seal skin, although called a bonus, is a rent, for the Secretary could not contract for a bonus, having no authority to do so. That in the lease the right was reserved for the Secretary at any time, if he deemed it proper and in his discretion, to reduce the quota, if it appeared that the protection of seal life required it; and under his authority as Secretary he was required each year to fix the quota which in his opinion and judgment could be safely taken. They say that during the years 1893-'4, for which demand is made, no quota was assigned to them, and they were not allowed to take any fur seals upon said islands, or in or about the waters around; that they were allowed to take only from the islands such fur-seal skins as were killed by the natives for domestic purposes,

in number 7,500. That the Secretary of the Treasury did not exercise the right reserved to him in the lease of reducing the quota to 7,500 with the view of protection to seal life, but said 7,500 skins were allowed to be taken by the natives under what was known as *modus vivendi*, or contract entered into between the Government of the United States and the Government of Great Britain, and in consequence thereof that

271 said number was not fixed under the covenants of the lease, but was fixed by agreement between the two political powers above mentioned, and outside of the covenants of the lease, and for different purposes, and was not contemplated by either the lessor or the lessee at the time the lease was made. They say that the expense which the company incurred as fixed charge for discharging the duties imposed upon them by the terms of the lease and maintaining the natives amounts to \$75,000 per annum. That this charge remains the same whether the catch is one skin or one hundred thousand. They say they have been put to enormous expense during the said year, and have been totally deprived of exercising the privileges granted to them in the lease. That the consideration for the lease on the one hand was the payment of the rents agreed upon, and upon the other the exclusive privilege of taking fur seals in and about said islands and the waters adjacent thereto. That, having been deprived of that privilege, not in the manner and upon the terms covenanted for under the lease, there has been a total failure of the consideration for which the lease was made, and that in law and equity they are entitled to the total abatement of the rents. They further claim that if they owe the Government anything it is only such sum as the Government is equitably entitled to receive on a quantum meruit for the skins that were taken outside of the conditions of the lease, and as an incident thereof, which sum they stand ready to pay the Government upon a settlement of the damages which have been inflicted upon them by a denial upon the part of the Government of their rights to exercise the privileges granted them under the lease, and a refusal to allow them under the lease to take any fur seals whatever. They therefore ask that the entire rent be equitably abated, and such sum be agreed on in payment and settlement for the skins which were turned over to the company and received from the 7,500 seals taken for domestic purposes for the Indians be had and made, which sum they are ready to pay, subject to their claim for damage herein set forth.

272 Second. The company, in consideration of the facts stated above, that the Government, arbitrarily and without their consent, and against their rights and interests, deprived them of the privilege which they had contracted for during the years 1893-'4 outside of the covenants of the lease, and by arrangement with the foreign Government, to which they were not a party, and by refusing to assign to them a quota, and by prohibiting them from taking any fur seals whatever, and by compelling them to comply with the terms of the lease and pay the expenses which they therein agreed to pay and for which they received nothing, has inflicted upon the company great damage, amounting to \$500,000. They charge that they could have taken during the years 1893-'4 with perfect safety to the herd, and without any diminution thereof, and without in anywise endangering seal life, 100,000 first-class fur seals in and about said islands. That for twenty years preceding the making of the lease to the North American Company the Alaska Fur Company, who had rented

the same privilege, was allowed to and did take each year 100,000 seal skins and sell the same in the market. They say that if they had been allowed to take the 100,000 contracted for per annum in the lease, and which they allege was contemplated at the time the lease was made, they would have made a profit of not less than \$7.50 upon each skin. They therefore claim that by the arbitrary action of the Government they have been deprived of their entire right and profits during said term, and which they allege will be \$500,000. They set up said damage as a legal and equitable offset and defence to any alleged claim which the Government brings to bear against them on account of the lease, and as rents for the years 1893-'4.

Third. They further say that in case it should be held that the privilege of taking the 7,500 seal skins during said time should be  
 273 treated by the Secretary as the equivalent and assignment of a quota to that extent (but against which action they protest), then that, by the terms of the original lease contract, and under the law, they were entitled each year and contracted each year for 100,000 fur-seal skins, and that the quota has been reduced as a consequence of the *modus vivendi*; but, if it is adjudged that such action was a compliance with the covenant of the lease allowing the Secretary to reduce it for the purpose therein specified, then they are entitled in law and equity to a proportionate reduction of the rents from the 100,000 which they contracted to the 7,500, the amount taken from the islands by them, and they ask that, if a settlement is due under the terms of the lease, such reduction as proportionate and proper be made to them and against any such settlement they ask to offset such portion of their damages as will settle the same.

#### NORTH AMERICAN COMMERCIAL COMPANY.

#### DEFENDANT'S EXHIBIT 31.

WASHINGTON, D. C., May 25, 1894.

To the SECRETARY OF THE TREASURY.

SIR: The North American Commercial Company begs leave to acknowledge the receipt of your letter of May 12, 1894, demanding payment of the sum of \$132,187.50 on account of alleged indebtedness of said company under its lease of the right to take fur seals for their skins during the season of 1893.

In reply, said company respectfully represents that during the entire year from May 1, 1893, to May 1, 1894, the right of said company to take fur seals in Alaska, as authorized by its contract with the Secretary of the Treasury on behalf of the United States, was withheld and denied, and said company was by the Government prohibited from taking  
 274 any fur seals during year, which was a direct violation by the United States of the stipulations and covenants of said lease, without any default on the part of said company. By the terms of said contract no indebtedness could accrue to the United States from said company, except for taking and shipping fur seal skins from the islands mentioned in the lease, and said company having been prevented by the United States from taking any seal skins during said year, it can not be lawfully chargeable for moneys agreed to be paid on condition when that condition has not been performed.

By reason of the failure of the United States to perform its contract during said year said company sustained damages in the sum of \$318,300.

The company admits that by permission of the United States it did receive from the natives of the seal islands 7,500 skins of fur seals taken during said year by said natives for food for which it paid to said natives the sum of fifty cents per skin, and said company is willing and hereby offers to credit the United States for the privilege of shipping said skins from said islands with such sum as the same was reasonably worth.

The company, however, desires to avoid all differences or contention with the United States; and in order to reach an amicable settlement of the claim named in your letter, upon due consideration and by advice of its counsel, it has determined to offer to the United States the sum of \$23,789.50 in cash, and to execute a release of all its claims for damages sustained by reason of the violation of the terms of its lease in the manner set above forth. The company makes this offer in good faith, believing it to be fair and just to both parties and in accordance with the uniform decisions of the Department under like conditions since the year 1870.

Very respectfully,

THE NORTH AMERICAN COMMERCIAL COMPANY.

By N. L. JEFFRIES, *Attorney.*

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DEFENDANT'S EXHIBIT No. 32.

[N. L. Jeffries, attorney-at-law.]

WASHINGTON, D. C., *November 27, 1895.*

To the honorable the SECRETARY OF THE TREASURY.

SIR: The North American Commercial Company, a corporation created by and existing under the laws of the State of California, presents this, its claim for damages against the United States, in the sum of two hundred and eighty-three thousand seven hundred and twenty-five dollars, through the honorable the Secretary of the Treasury to the proper accounting officers of the Department of the Treasury for examination and allowance.

The said claimant is the lessee of the right to take fur seals for their skins, on the islands of St. Paul and St. George in Alaska, by virtue of a certain written obligatory, executed by and between said company and the Secretary of the Treasury on behalf of the United States, on or about the 12th day of March, 1890, at Washington, D. C., a copy of which said written obligatory or lease is hereto annexed, marked Exhibit "A"; by the terms of said instrument the United States leased to the said company the exclusive right to engage in the business of taking fur seals on said islands and of sending a vessel or vessels to said islands for the skins of said seals for the period of twenty years from May 1, 1890.

That in consideration thereof the said North American Commercial Company agreed to pay to the United States the sum of sixty thousand dollars per annum during the term of said lease; also a revenue tax or duty of two dollars on each fur seal skin taken and shipped by it from said islands, and the further sum of seven dollars and sixty-two  
276 and one-half cents on each seal skin taken by said company and shipped from said islands. Said amounts to be paid annually on or before the first day of April, beginning with the year 1891.



That during the year ending April, 1894, the supply of killable fur seals on said islands was amply sufficient to permit the said lessee to take thirty thousand fur seals for their skins and ship that number of fur-seal skins from said islands without injury to the permanent supply of seals on said islands, and the said lessee was then and there prepared and expecting to take that number of seal skins; but on account of an international arrangement entered into by the United States with the Government of Great Britain, by which the United States agreed to prohibit the taking of fur seals for their skins during the said year, ending April 1, 1894, the lessee was prohibited by the United States from taking any fur seals on said islands during said year, and incurred the expense of maintaining its business, furnishing supplies to the inhabitants of said islands, maintain schools, supplying medicine and medical attendance, providing dwelling houses for said inhabitants, and maintaining the aged and infirm, the widows and orphans of both islands as it had agreed to do, in consideration of the agreement of the United States that it should have the right to take fur seals each and every year for the period of twenty years from May 1, 1890.

That the said lessee has faithfully performed its agreement, but the United States has violated its contract and has prohibited the lessee from taking fur seals as aforesaid, and from realizing any proceeds or profits which said company would have received if it had been permitted to take and ship the seal skins which were then and there available for the purpose, to wit, the skins of thirty thousand fur seals.

That by reason of said prohibition by the United States as aforesaid, the said company sustained a loss of \$283,725 as aforesaid, which  
277 amount it would have realized if it had been permitted to take fur seals during said year, and which amount it now demands payment of the United States.

Respectfully submitted for the consideration of the accounting officers of the Treasury Department.

THE NORTH AMERICAN COMMERCIAL COMPANY.  
By N. L. JEFFRIES, *Its Attorney*.

#### DEFENDANT'S EXHIBIT 33.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., December 24, 1895.

Hon. N. L. JEFFRIES,  
*Attorney North American Commercial Company, Washington, D. C.*

SIR: Referring to your communication of the 27th ultimo, wherein claim is made on behalf of the North American Commercial Company for damages in the sum of \$283,725 for losses alleged to have been sustained by said company as lessees of the islands of St. Paul and St. George, Alaska, it being prevented from taking seals under its contract during the year ended April 1, 1894, I have to inform you that the claim is rejected hereby.

Respectfully, yours,

C. S. HAMLIN,  
*Assistant Secretary.*  
Given.

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## DEFENDANT'S EXHIBIT 34.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., March 28, 1894.*

LYOYD TEVIS, Esqr.,  
*President North American Commercial Company.*

SIR: Upon your application, and without prejudice to the rights of the company or the Government, the annual settlement and all matters in dispute between the Government and your company are left open for further consideration until the 15th of May next. In the meantime you can prepare and present such papers as you may deem proper.

Very respectfully,

J. G. CARLISLE, *Secretary.*

## DEFENDANT'S EXHIBIT 35.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., April 18, 1872.*

Gen'l JOHN F. MILLER,  
*Pres't. Alaska Com'l Co., per N. L. Jeffries, Atty.*

SIR: Respectfully referring to the letter of this Department addressed to you under date of the 15th of February last, denying your application for a reduction of the rent to be paid by the Alaska Commercial Company under its lease of the islands of St. Paul and St. George for the year ended May 1, 1871, I have to state that that denial was, as stated therein, based upon an opinion of the Assistant Solicitor of the Treasury, to the

effect that the terms of the contract between that company and  
279 the Government did not warrant the reducing of the rental for that year, the amount to be paid having, as he understood, been definitely fixed by an amendment to the lease, dated August 9, 1870.

An examination of the lease shows that the yearly rental to be paid by said company was \$55,000, and that they were restricted in the number of seals to be killed for their fur skins to be 100,000 per annum. The reduction of rent for that year to \$27,500 made in the agreement of August 9, 1870, was based upon the fact that half of the season had then elapsed, and that no more than 50,000 should be killed that year, but it was understood that the maximum number of skins mentioned would be taken. It appears, however, from the report of Captain Bryant, in charge of said islands, that only 9,965 skins were taken that season, or a little less than one-fifth of the maximum number allowed, by which, if a proportionate reduction in the rent to be paid for that year were allowed, would make the rent for 1870 \$5,480.75.

Upon a reconsideration of the matter, I am inclined to regard the abatement of rent made in the agreement of August 9, 1870, a conditional one and not final, and the deposit of \$27,500 made in pursuance thereof also conditional, and under this view the Solicitor now states that he considers it competent for the Secretary of the Treasury to make such reduction in the rental for that year as may seem to him just.

The final settlement, therefore, of the amount of rent to be paid under said lease for year mentioned, I have decided that the sum of \$5,480.75 only of the deposit of \$27,500, made with Mr. Tuttle, the Assistant

Treasurer, on the 29th of April last, shall be retained, and the remainder shall be returned to said company or their duly authorized agent.

I am, very respectfully,

GEO. S. BOUTWELL, *Secretary.*

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PLAINTIFFS' EXHIBIT 36.

[Copy.]

MAY 12, 1894.

MR. LLOYD TEVIS,

*President North American Commercial Company,  
San Francisco, Cal.*

SIR: I am advised by the honorable the Attorney-General that the action of my predecessors in effecting certain settlements of the indebtedness of your company as lessees of the seal islands of Alaska was not in accordance with the law. I have therefore referred the subject to him for suitable action in the premises, with a statement showing the number of seals taken by your company during the years 1890 to 1892, both inclusive, the amounts paid by said company under its lease, the amounts remaining unpaid with interest thereon, and the total indebtedness of said company to the United States to April 1, 1893.

For your information the statement referred to is given as follows:

*Number of seals taken.*

1890.....	20,995
1891.....	13,482 (of which 1,231 were stagy.)
1892.....	7,549

281	Amount due.	Amount paid.	Balance due.	Interest on balance due.
1890.				
Rental.....	\$60,000.00	\$12,597.00	\$47,403.00	\$8,532.00
Tax on 20,995, at \$2.....	41,990.00	41,990.00	.....	.....
Bonus on 20,995, at \$7.625.....	160,086.88	160,086.88	.....	.....
	262,076.88	214,673.88	47,403.00	8,532.54
1891.				
Rental.....	60,000.00	8,089.20	51,910.80	6,229.29
Tax on 13,482, at \$2.....	26,964.00	26,964.00	.....	.....
Bonus on 12,251, at \$7.625.....	93,413.87	11,696.03	81,717.84	9,806.14
	180,377.87	46,749.23	133,628.64	16,035.43
1892.				
Rental.....	60,000.00	4,529.40	55,470.60	3,328.23
Tax on 7,549, at \$2.....	15,098.00	15,098.00	.....	.....
Bonus on 7,549, at \$7.625.....	57,561.12	4,345.20	53,215.92	3,192.95
	132,659.12	23,972.60	108,686.52	6,521.18

RECAPITULATION.

	Balance due.	Interest.	Total.
1890.....	\$47,403.00	\$8,532.54	\$55,935.54
1891.....	133,628.64	16,035.43	149,664.07
1892.....	108,686.52	6,521.18	115,207.70
	289,718.16	31,089.15	320,807.31

Respectfully, yours,

S. WIKE, *Acting Secretary.*

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## PLAINTIFF'S EXHIBIT 37.

JUNE 4, 1894.

Hon. N. L. JEFFRIES,

*Attorney North American Commercial Company,**No. 1417 G street NW., Washington, D. C.*

SIR: Replying to your letter of the 25th ultimo, in relation to the indebtedness of your company under its contract as lessees of the seal islands of Alaska for the year ended April 1, 1894, wherein you make an offer of the sum of \$23,789.50 in cash and propose to execute a release of all claims for damages alleged to have been sustained in being deprived of the privilege of taking the full quota of seals named in the lease of said company as a consideration for the settlement of its indebtedness for the year named, I have to inform you that the proposition is declined, and that the honorable the Attorney-General has been requested to take the necessary measures for the collection of the indebtedness of the company for the year specified.

Respectfully, yours,

J. G. CARLISLE, *Secretary.*

## PLAINTIFF'S EXHIBIT 38.

WASHINGTON, D. C., *January 12, 1893.*

To the Hon. CHARLES FOSTER,

*Secretary of the Treasury.*

SIR: On behalf of the North American Commercial Company of San Francisco, California, I have the honor to acknowledge receipt of a statement of the indebtedness of said company for the year 1892 under the provisions of its lease from the United States of the privilege of taking fur seals in Alaska.

The object of this communication is to point out an error in the computation of the amount of rental as set forth in the Department's statement, or rather the failure to reduce the amount of the entire rental in proportion to the reduction of the quota, as has been done heretofore and as required by the act of Congress authorizing said lease.

To be specific. The amount of rental charged to each seal skin has not been reduced, but is charged at the same rate as if the company had been permitted by the Department to take the lawful quota of 100,000 seals, whereas it has been restricted by the Department to 7,500.

It is unnecessary to inform the Secretary of the Treasury that this company has sustained damages to a very large amount by the action of the United States in prohibiting it from taking the number of seals that were available and which it was authorized by law and its contract to take. In its settlement of last year it gave to the United States a release of all claim for damages against the Government, and the account was adjusted, in accordance with law and the established precedents of the Department, by reducing the rental in proportion to the reduction of the quota.

The same basis of calculation will show the correct amount now due from said company to the United States to be \$23,972.60, which sum said company is prepared and willing to pay; and the North American Commercial Company hereby waives all claim for damages against the

United States on account of its failure to secure the number of seals to which it was entitled by law and its contract, and said company further releases to the United States any and all claims to compensation for the damage and loss it has sustained up to and including the date of this communication on account of the destruction and waste of seal life by the subjects of Great Britain.

Very respectfully,

THE NORTH AMERICAN COMMERCIAL COMPANY.

By N. L. JEFFRIES, *Its Attorney.*

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PLAINTIFF'S EXHIBIT 39.

ST. PAUL ISLAND, ALASKA, *July 31st, 1889.*

SIR: I have the honor to transmit a report of the operations and condition of the seal island of Alaska for the year ending July 31st, 1889. I also accept and enclose the reports of Mr. J. P. Manchester and Capt. A. P. Loud, assistant Treasury agents of St. Paul and St. George islands, respectively, they having been personally in charge of these islands for the past two years. The enclosed tabulated mortality tables were made by Dr. C. A. Lutz, the resident physician of this island, are correct and worthy of consideration. I shall confine my remarks to the island of St. Paul, as I have had no opportunity to visit St. George Island since my arrival here June 1st. I am satisfied, however, from the information I have received from Col. Joseph Murray, Treasury agent now in charge of St. George Island, that the same condition of affairs exist there as on this (St. Paul) island. By referring to the itemized statement of skins taken, you will observe the number of pups killed for food during the fall of 1888 was 2,178. 'This was an unusual' small number, excepting the year previous, but it was adjudged the proper per cent to kill under the existing circumstances and respecting the future of the rookeries. The killing of a large number of merchantable seals for food followed during the winter. These skins were salted and accepted by the Alaska Commercial Company as part of their quota of skins for this year. The first appearance of the bulls to their usual annual haunts was May 5th, but the coming of these animals to the rookeries was unusually late, followed by a late appearance of the cows. At first it was supposed that the severe winter had prevented the seals from returning, as in the past,

285 but close observation on the part of Mr. J. P. Manchester revealed the fact that it was owing to the scarcity of the seals, which was to him very perceptible as the season advanced. And as the killing by the Alaska Commercial Company proceeded, the daily, weekly, and monthly receipts were much smaller than ever before. The small number of pups killed in the fall for food; the late appearance of the bulls and cows the following spring in large schools, as in the past, and the alarming decrease in the daily, weekly, and monthly receipts of the Alaska Commercial Company, and, as a dernier resort by said company to secure their 100,000 skins, the killing of smaller seals than was customary attest conclusively that Mr. J. P. Manchester's observations were undoubtedly correct, that there is a scarcity of seals, and that within the last year or so they are from some cause decreasing far beyond the increase.

As this is the last year of the present lessees, and there is a new lease to be made, I would respectfully suggest that it is of vital importance to the existence of seal life that the annual quota in the future be limited to the taking of 60,000 skins as the maximum from the Pribilof islands, 52,500 from the St. Paul, Otter, and Walrus islands, and 7,500 from St. George Island for the first five years of the lease. At the expiration of said time the number to be increased or decreased as the Secretary of the Treasury may deem advisable. The work of killing seals and salting skins has been accomplished only through the assistance rendered by labor imported from Ounalaska, as the number of laborers on the island was too small to complete the task within the limited time allotted by the Government. By reference to the census you will see that the inhabitants are annually decreasing and that the females are largely in excess of the males. And here I will say I heartily concur with Mr. T. F. Ryan, formerly Treasury agent to the islands, whose letter to the Department bearing date April 8th, 1889, upon this subject was referred

286 May 6th, 1889, will say that some way to infuse new life into these few remaining people should be devised by the Department at once and speedily executed before it is too late. It is impossible for the Treasury agent in charge to receive reliable information concerning the wishes and condition of the natives elsewhere on the Aleutian chain. Whether they are willing or even would come to these islands to live. He has no facility for traveling to either Otter or Walrus islands, both within a range of ten miles to this island, and it is his duty to visit them occasionally, without it is through the courtesy extended by the Alaska Commercial Company, and at no little expense to the company. If it is deemed advisable to send a vessel along the Aleutian chain to secure strong, healthy male laborers, who are willing to come to the islands and make them their future homes, it should be done at once, under the supervision of a Treasury agent familiar with the conditions of St. Paul and St. George islands, accompanied by a resident physician from one of the islands. On June 27th the Alaska Commercial Company, through Dr. H. H. McIntyre, their general manager, furnished me a boat manned and rigged, and I visited Otter Island and found about 2,000 killable seals, and many were in the water near by. Under the present lease the lessees are not allowed to kill seals on this island, consequently they are not molested without taken by pirates, which has been the result once or twice in the past. This island and Walrus should be included in the next lease. The number of resident laborers on this island at present is 52, aged from 63 to 13 years, classified as follows: Clubbers, 6; stickers, 6; flippers, 8; skimmers, 32. The number of laborers from Ounalaska is 23. These men did general work, such as salting skins, booking, bundling, and delivering them to the warehouse ready for shipment.

This entire work was formerly done by the natives, but of late years the native force became too small, compelling the Alaska Com-  
287 mercial Company to introduce labor from abroad. These men, however, are paid by the Alaska Commercial Company and the natives receive the entire proceeds of the catch. The number of seals killed upon the island this season was 85,000, and sea lions 25. The killing commenced June 5th and ended July 31st. The natives realized



\$33,759.80 for the season's catch which was distributed as per enclosed statement. On June 26th the U. S. man-of-war, the "Thetis," Lieut. Commander Stockton, arrived from Sitka, also the U. S. cutter, the "Rush," Captain Sheperd. The "Thetis" left the following day at noon for St. Michaels en route for Point Barrow and the "Rush," June 28th for a cruise through Bering Sea. On July 18th, Mr. Webster, the Alaska Commercial Company's agent at North East Point, this island, sighted a schooner about 5 miles off the island. On July 25th the U. S. cutter the "Rush," Captain Sheperd, again anchored at the east landing, and informed me that he had seized the British schooners "Mattie" and "Black Diamond." The "Mattie" was seized July 17th and had on board 418 seal skins. The "Black Diamond" was seized July 11th, with 76 seal skins aboard. He also informed me that there were no less than thirty schooners in Bering Sea with predatory intentions. If these piratical vessels are allowed to butcher the seals regardless of age and sex, the seals of Alaska will soon be exterminated. The prosperity of these world-renowned rookeries is fast fading away under the present annual catch allowed by law, and this indiscreet slaughter now being waged in these waters will only hasten the end of the fur seals of the Pribylof Islands. Captain Shepard is a faithful, conscientious and energetic officer and is deserving the loudest encomium from the Department, but without assistance it is impossible for him to police the waters effectually. In the retirement of Mr. J. P. Manchester the Department loses a fearless, faithful and honorable officer. One who has, in the performance of his duties, reflected 288 credit upon himself and honor to his Government. Capt. A. P. Loud has also discharged his duties in a creditable manner and retires from office leaving a record to be envied by his successor. In conclusion I desire to say, that the Alaska Commercial Company have not only strictly conformed to the requirements of the lease during the present season, but have manifested a generous protectorate towards the natives.

Respectfully submitted.

CHARLES J. GOFF, *Treasury Agent.*

To the Hon. WM. WINDOM,

*Secretary of the Treasury.*

#### PLAINTIFF'S EXHIBIT 40.

CLARKSBURG, WEST VA., *December 23, 1889.*

SIR: I have the honor to submit the following, supplementary to my annual report of the operations and conditions of the seal islands, Alaska, for the season of 1889.

On September the 22, the Alaska Commercial Company's steamer "Dora" arrived at St. Paul's Island having on board Mr. S. R. Nettleton, your recent appointee as agent of the seal fisheries, who is now in charge of the island. I have returned to my home for the winter, as per instructions bearing date August 10th, 1889. After the closing of the sealing season, which was July 31st, I visited the rookeries daily and made a careful survey of them to ascertain as near as possible the condition of the present seal life with the past. From the first I was forcibly impressed with the decrease in the number, taking as a guide the report of

my predecessor, the Hon. George R. Tingle, but thinking I might be mistaken and not wishing to sound a needless alarm to the Department, I ventured the suggestion of taking 60,000 seals as the maximum for the first five years of the new lease, the number to be increased or decreased  
 289 as the Secretary may deem advisable. I now, without hesitation, after a more careful observation of the entire situation, think that my suggestion of 60,000 was too high, and would respectfully insert instead 50,000 as the maximum, the number to be increased or decreased as the Secretary may see proper, the number to be proportioned between the two islands as the agent in charge may adjudge best for the protection of the rookeries. I regard it absolutely essential for the future of the rookeries that prompt action be taken by the Department for the suppression of illegal killing of seals in Behring Sea and that the utmost economy be observed in taking the seals allowed by law. There should be no killing after July 20th; after that date the cows have a tendency to haul out with the young bulls, and the natives, in making drives from the rookeries to the killing grounds, find it impossible to separate the males from the females, consequently many small pups and cows are driven with the herd, which necessarily results in the loss of many pups and great injury to the cows. Under the existing law or regulations the natives are allowed to kill pups just before they take their departure from the island for the winter, which is in November, for their winter's supply of meat, and under the pretense that they need the skins (which they get) for clothing. This is without doubt a useless slaughter of young seals, amounting to about 5,000 annually, and should receive the firmest condemnation by the Department. First, because the rookeries will not admit of this wanton destruction without leaving its impress upon their now weak condition; second, the winter's supply of meat should be secured during the killing season by erecting cold-storage houses and placing therein as many thousand carcasses as are needed, not only for the islands, but for the natives, if necessary, along the Aleutian Islands, or the supply secured by canning the meat, either of which would be by far cheaper for the Government than the destruction of  
 290 5,000 young seals annually, which is equivalent to \$15,000 per annum; third, the skins are never made into clothing through necessity and are too small to be used in covering their boots. The natives purchase their clothing from the Alaska Commercial Company at reasonable prices; the skins are made into blankets, coats, caps, gloves, &c., and traded to passing vessels for trinkets and useless articles, and are a source through which they look for intoxicants. They will refuse to sell their blankets to the company for cash, preferring to run the chance of smuggling them off for whisky. Under the existing regulations the natives living along the Aleutian chain have conceived the idea that they also are allowed to kill seals for food, and many thousands are killed by them as they pass through the passes to and from the islands only for the skins, which are sold and traded for whisky to poaching vessels. The enclosed statistics of seals killed illegally was compiled by Dr. H. McIntyre, general manager of the Alaska Commercial Company, and upon my request he furnished me with a copy. I regard them as being of vital importance to the Department, as they are substantially correct.

In conclusion, I desire to ask upon what has a Treasury agent to base his actions? Are there any existing laws that give to him the authority for issuing orders and controlling the natives as in the past? This is getting to be a serious question, and sooner or later a conflict of authority will arise which will result disastrously.

Respectfully submitted.

CHARLES J. GOFF, *Treasury Agent.*

To the Hon. WILLIAM WINDOM,  
*Secretary of the Treasury.*

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PLAINTIFF'S EXHIBIT 41.

ST. PAUL ISLAND, ALASKA, *July 31, 1890.*

SIR: Pursuant to instructions, I sailed from San Francisco on May 6th, on the North American Commercial Company's steamer *Arago*, accompanied by Mr. A. W. Lavender, assistant Treasury agent, who, after his arrival, was stationed upon St. George Island to assist Mr. Joseph Murray in the discharge of his duties during the killing season, and who will have charge of the island during the coming winter. We arrived at Unalakleet May 18th, and on the 20th Mr. George R. Tingle, Mr. Rudolph Newman, and myself sailed on the Alaska Commercial Company's steamer "*Dora*" for the seal islands, to take an inventory of the property on St. George and St. Paul belonging to the Alaska Commercial Company, according to an agreement signed by and between the Alaska Commercial Company and the North American Commercial Company March 12th, 1890.

The Alaska Commercial Company was represented by Mr. Newman and the North American Commercial Company by Mr. Tingle, and I acted as umpire as per your instructions bearing date April 16th, 1890. We arrived at St. Paul Island May 21st and immediately commenced to take stock. After several days' labor the business was well in hand and we proceeded to St. George Island, per steamer "*Dora*," and made a complete inspection and inventory of all the property there belonging to the Alaska Commercial Company. After our return to St. Paul there was one difference referred to me and satisfactorily adjusted, then the entire business was settled by the representatives of their respective companies.

The following property was transferred to the North American Commercial Company: Sixty-three (63) native houses on St. Paul and  
292 nineteen (19) upon St. George, and upon both islands all buildings and other property belonging to the Alaska Commercial Company.

Upon St. Paul Island the sum of nine thousand two hundred and thirteen  $\frac{58}{100}$  dollars (\$9,213  $\frac{58}{100}$ ) belonging to the natives, and deposited with the Alaska Commercial Company, was passed to the North American Commercial Company, with the consent of the natives, and credited to their "pass book" accounts. Also several special individual deposits, amounting to twelve thousand one hundred and seventeen  $\frac{92}{100}$  dollars (\$12,117  $\frac{92}{100}$ ), drawing interest at 4% per annum, leaving in the hands of the Alaska Commercial Company three thousand four hundred and four  $\frac{29}{100}$  dollars (\$3,404  $\frac{29}{100}$ ) to the credit of Mrs. Alexandria Milevedoff, who did not wish to make a change. On St. George five thousand three hundred and ninety-one  $\frac{17}{100}$  dollars (\$5,391  $\frac{17}{100}$ ) was transferred to the

North American Commercial Company, but from this amount the sum of one thousand seven hundred dollars (\$1,700) belonging to the priest must be deducted, leaving a balance of three thousand six hundred and ninety-one  $\frac{87}{100}$  dollars (\$3,691  $\frac{87}{100}$ ) to the credit of the natives. The transfer was made and dated May 24, 1890. The past winter was unusually mild, the sanitary condition of the village was good, the people were blessed with good health, and they passed the time pleasantly. They were under the combined charge of Mr. S. R. Nettleton, assistant Treasury agent, Dr. C. A. Lutz, resident physician, and Mr. J. C. Redpath, resident agent for the Alaska Commercial Company. With the spring came that dreaded disease to this people, pneumonia, which caused the death of three (3) sealers; other ailments prevalent among them carried off seven others, women and children, making a total of ten (10) deaths since January 1, 1890, the date of the census, leaving at present a total population

293 of two hundred and eight (208). The population of St. Paul Island in 1872—as far back as the official records go, was two hundred and eighteen (218); arrivals since then, seventy-six (76). Had it not been for this influx of immigration the native population would have been about extinct. The established rule of thoroughly cleaning the village in the spring and fall presents a marked contrast to the condition of the place a few years ago. All along the greensward, in front of the dwelling, which was then a depository for filth and offal, the children romp and play.

Gradually, too, the people are becoming more reconciled to cleaner methods in their dwellings, and many of them take great pride in their personal appearance and cleanliness. The school on this island was taught by Simeon Milivedoff, a native, who was educated in San Francisco; it was opened on September 1st, 1889, and closed May 1st, 1890. Total number of school days, one hundred and seventy-two (172); number taught, one hundred and twenty (120).

Mr. Milivedoff was energetic and untiring in his efforts to advance the pupils, but there is very little interest taken by them in English-speaking schools, so that there was but little progress made.

The North American Commercial Company have commenced repairing the native dwelling houses, and so far have complied with all the requirements of their lease. The U. S. cutter, the "Bear," Captain M. A. Healy, anchored off this island June 20th, and left on the same day. Captain Healy reported "No pirates in Behring Sea." The "Bear" delivered to this island the boat and fixtures complete asked for by me from the Department.

The Rev. Sheldon Jackson was a passenger on board the "Bear" and came ashore and inspected the village and schoolhouse. He received a copy of the school report and was well pleased with the condition in which he found things.

On July 31st, in company with Mr. Tingle and Professor  
294 Elliott, I visited Otto Island and found, to my surprise, that there were no seals hauled out, as was usual in the past.

The U. S. cutter "Richard Rush," Captain W. C. Coulson, arrived here July 17th and reported "No pirates in Behring Sea." Professor H. W. Elliott, your recent appointee as Treasury agent, has spent the season here, dividing his time between the two islands and giving his

entire attention to the state of the rookeries and the methods used at present in driving and killing the seals, and his report will no doubt be of the utmost importance and of great value to the Department.

Mr. Wm. Palmer, a representative of the Smithsonian Institute, has by your permission spent the season on St. Paul collecting specimens of various birds and animals, and his incessant labors have been abundantly rewarded.

The merchantable seal skins in the salt houses on St. Paul and St. George islands, taken from the seals killed for food for the natives during the winter of 1889-90, will be shipped as per instructions bearing date May 5th, per U. S. cutter "Richard Rush," Captain W. C. Coulson, commanding, which will leave here early in September, consigned to the collector of customs, San Francisco. The matter will be reported directly to you by Mr. Joseph Murray, who has charge of St. Paul Island for the coming winter. The accompanying communications from the representatives of the Alaska Commercial Company and the North American Commercial Company will fully explain my actions in the matter.

The total number of fur seals killed and accepted upon this island by the lessees was sixteen thousand eight hundred and thirty (16,830), and the total amount earned by the natives and distributed to them was six thousand seven hundred and eighty-three  $\frac{30}{100}$  dollars (\$6,783 $\frac{30}{100}$ ). Your instructions to me upon the subject of dividing the earnings of the natives and looking after their welfare financially I endeavored to follow, but was prevented from doing so by Mr. George R. Tingle, 295 general manager for the lessees; his reasons for so doing are enclosed.

I regret that I am compelled to report that the seals are rapidly diminishing in numbers, and to such an alarming extent that to check the decrease will require, in my opinion, the most careful consideration of the Department.

To have a correct understanding of how the annual catch is taken, it will be necessary to bear in mind the following facts: 1st. By the acts of Congress governing the seal fisheries, the season opens June 1st and closes July 31st, unless otherwise restricted by the Secretary of the Treasury. 2d. The bull seals arrive at the islands between May 1st and June 10th, and the cows between June 10th and July 10th. 3d. The large young seals, whose skins are merchantable, commence coming about the middle of May, gradually increasing in numbers as the cows appear; and with the large young seals comes a small portion of the pups born the summer before, but the greatest majority of the yearlings put in their appearance in the month of July. Now, in opening the season it is customary to secure all the two-year olds and upwards possible before the yearlings begin to fill up the hauling grounds and mix with the killable seals; by so doing it is much easier to do the work and the yearlings are not tortured by being driven and redriven to the killing grounds. Heretofore it was seldom that more than 15% of all the seals driven the latter part of June and the first few days in July were too small to be killed, but this season the case was reversed, and in many instances eighty (80) to eighty-five (85) per cent were turned away. The accompanying percentage examples will show the disposition of this year's drive. The

first killing of fur seals by the lessees was on June 6th, and the scarcity of killable seals was apparent to all. The season closed July 20th, and the drives in July show a decided increase in the percentages of small seals turned away and a decrease in the killables over the  
 296 drives of June, demonstrating conclusively that there were but few killable seals arriving, and that the larger part of those returning to the islands were the pups of last year. The average daily killing for the season was four hundred (400) or a daily average of five hundred and twenty-two (522), including only the days worked.

In 1889 the average daily killing from June 1st to July 20th, inclusive, was one thousand five hundred and sixteen (1,516), or a daily average of one thousand nine hundred and seventy-four (1,974), including only the days worked. With this undeniable decrease in merchantable seals, and knowing the impoverished condition of the rookeries and hauling grounds, and believing it to be inimical to the best interest of the Government to extend the time for killing beyond July 20th, I adhered to the letter and spirit of your instructions to me and closed the killing season July 20th, against the bitter protestations of Mr. George R. Tingle, general manager for the lessees. His communication to me upon the subject and my reply are enclosed. Had there been a reasonable probability of the lessees securing their quota of sixty thousand (60,000) seals, I should have deemed it my duty to extend the time for killing to July 31st.

The killing of June 6th, the first of the season, was from the Reef Rookery, with drive of about seven hundred (700) seals; total killed, one hundred and sixteen (116), eighty-three and one-half ( $83\frac{1}{2}$ ) per cent being turned away as too small. On June 11th the drive was from the Reef Rookery, about one thousand (1,000); total killed, five hundred and seventy-four (574); forty-two and one-half ( $42\frac{1}{2}$ ) per cent turned away. On June 24th the drive was from the Reef Rookery and Zoltoi hauling grounds combined, and about one thousand four hundred and seventeen (1,417) were driven; total killed, two hundred and six (206); eighty-five and one-half ( $85\frac{1}{2}$ ) per cent turned away. This exhausted Zoltoi haul-

ing grounds for a period of twenty-one days, and it was not  
 297 available until July 19th, when again, in connection with the Reef

Rookery, the last drive was made, and about three thousand nine hundred and fifty-six (3,956) seals were driven, five hundred and fifty-six (556) were killed, and eighty-six (86) per cent turned away. The seals turned away from the several drives invariably returned to the hauling grounds and rookery from which they were driven, only to be redriven to the killing field and culled of the few killables that chanced to join them upon their return to the sea from each drive. By referring to the table marked D, showing the daily killing for this year, and also comparing the same with that of last year, you will see that from all of the drives the same percentages were turned away as from those I have cited.

We opened the season by a drive from the Reef Rookery and turned away eighty-three and one-half ( $83\frac{1}{2}$ ) per cent, when we should have turned away about fifteen (15%) per cent of the seals driven, and we closed the season by turning away eighty-six (86) per cent, a fact which proves to every impartial mind that we are redriving the yearlings, and, considering the number of skins obtained, that it was impossible to



secure the number allowed by the lease; that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives, and the Government.

On Sunday, July 20th, all the rookeries presenting any male seals were driven, from English Bay, Middle Hill, Tolstoi, Lukannon, Keetavia, and Rocky Point. About four thousand six hundred and twenty (4,620) seals were brought to the killing field, seven hundred and eighty (780) were killed, and eighty-three (83) per cent were turned away. On the same day at North East Point they killed four hundred and sixty-six (466), which, added to those taken at the other rookeries, makes a grand total of one thousand two hundred and forty-six (1,246).

This, and the killing on July 19th, are the only instances recorded during the season when the daily killing reached one thousand (1,000). Comparing the killing with those of the same dates last year, we find that on July 19, 1889, from South West Bay hauling grounds alone one thousand nine hundred and eighty-seven (1,987) were killed, and on July 20, 1889, from the Reef Rookery and Zoltoi hauling grounds one thousand nine hundred and thirteen (1,913) were killed, and never were such percentages turned away during the entire season—not in any previous season, to my knowledge—as in that of 1890. It is true, however, that the Alaska Commercial Company could and did take smaller seals last season than the present lessees can take, because of the differences in the tax paid by them; yet there has been no two-year-olds of an average size turned away this season; they were all immediately clubbed to swell the season's catch, which is far below the number allowed for this year—a condition of affairs that will convey to the Department, in language far more convincing than mine, the fact that the seals are not here.

The North American Commercial Company's agent, Mr. George R. Tingle, used every effort to have the drives made so as to have no unnecessary loss of seal life, and he would have made the season a most successful one for the company if the seals had returned to the rookeries as in the past.

It is evident that the many preying evils upon seal life—the killing of the seals in the Pacific Ocean, along the Aleutian Islands, and as they come through the passes to the Behring Sea, by the pirates in these waters, and the indiscriminate slaughter upon the islands regardless of the future life of the breeding rookeries—have at last, with their combined destructive power, reduced these rookeries to their present impoverished condition, and to such an unequal distribution of ages and sexes that it is but a question of a few years, unless immediately attended to, before the seal family of the Pribilof Group of islands will be a thing of the

past. Notwithstanding the fact that the seals were looked upon as inexhaustible, and were officially reported to be increasing as late as 1888, the time has suddenly come when experiment and imagination must cease and the truth be told. Absolute protection is the only safeguard for the rookeries, and the only step to be taken with safety. The seal meat necessary for the natives' food is all that should be killed under existing circumstances. Much can be written on this subject, many theories may be advanced, all of which we have had for the past twenty years to the evident loss of seal life, but the facts pre-

sented in the accompanying tables demonstrate with mathematical certainty the fearful decrease of the seals, and here I will say I heartily concur with my worthy predecessor, Mr. George R. Tingle, who, in his official report of 1887, used the following language:

"The Department can not place too high an estimate on the value of this seal property, and the Government, I am sure, will not yield to any demands which would make it possible to accomplish the destruction of her seal rookeries and seal life, which under judicious management and protection by law may be perpetuated indefinitely."

There is but one authority on seal life, especially the seals of the Pribilof Islands, and this is the work of Professor Henry W. Elliott, who surveyed these rookeries in 1872 and 1874, and his work was verified by Lieut. Maynard, and I am satisfied was as near correct when made as possible for man to chronicle, but to-day there is marked contrast in the condition of now and then. On page 54 of the Professor's monograph you will find he places the number of seals upon North East Point Rookery at one million two hundred thousand (1,200,000). Standing on a prominent elevation, known as "Hutchinson's Hill," in the month of July, and facing the north, I had before me a sea margin of over two miles; turning and facing the south, I had a sea margin of over one mile. I could view entire this once famous rookery, and it was simply impossible to realize that there was ever such a moving mass of living animals as Professor Elliott describes; his estimate seems incredible. Yet his writings have never been refuted. To-day there is not to be seen over two hundred and fifty thousand seals, of all ages and sexes.

To the extreme southwest of the island is the Reef Rookery, reported to have (by Professor Elliott) three hundred and one thousand seals in 1874. It has not over one hundred thousand (100,000) seals to-day. "Garbotch," the adjoining rookery, where the Professor says he stood on "Old John Rock" and saw "ten thousand fighting bulls," I can stand and count every bull in sight. This rookery with the reef is an extended point running out into the sea, sloping east and west with a large surface of table-land in the centre. This was once the parading or playing ground when the seals met as they came from the east and west sides; it was the resort of over two hundred thousand seals; now the resting place for a few cows and pups and now and then a worn-out, sleeping bull. The number now visiting these rookeries (the Reef and Garbotch) find ample room on the two slopes, without pushing back on the plateau above.

Zoltoi sands, once a favorite hauling ground for the bachelor seals, from where thousands have been driven and killed for their skins, is entirely deserted, only, however, a short time in advance of all the hauling grounds and rookeries if immediate steps are not taken by the Department to nurse and protect these rookeries. Lukannan, a rookery on the east side of the island, between the Reef and Bolavania, the most picturesque seal grounds of them all, where the seals were wont to haul upon the cliffs and in the interstices between the rugged rocks for over half a mile on the sea frontage, a most inviting home for this mysterious pelagic family, where, in connection with Kectavia Rookery with the same sea range, there were three hundred and thirty-five thousand (335,000) of these animals, presents at present to the most careful estimate not over seventy-five thousand (75,000) seals.

Polavania rookery, with four thousand feet (4,000) of sea margin, with a seal life of three hundred thousand (300,000) in 1874, Tolstoi rookery, with three thousand feet (3,000) of sea margin, with two hundred and twenty-five thousand seals in 1874, and Zapadnia, with five thousand eight hundred and eighty (5,880) feet of sea margin, with four hundred and forty-one thousand seals (441,000) in 1874, all present a most deplorable condition, and do not show over one-eighth (<sup>1</sup>) of the seals as reported by Professor Elliott.

With these facts in view, I am convinced there will be a greater decrease in seal life next year than this; for it will not be in the power of humane ingenuity to check the rapid advance towards extermination now going on in that length of time.

In conclusion, I respectfully suggest, that there be no killing of fur seals for their skins on these islands, nor in the waters of Behring Sea, for an indefinite number of years, to be named by the Secretary of the Treasury, and let nature take her course in replenishing the rookeries; and that the Department take the entire matter of protecting these rookeries under its immediate supervision, for I regard any other system of protection dangerous to the future of all interested. The limited number of seals killed this season by the lessees will undoubtedly leave the majority of the natives in absolute want, and their condition will appeal to the Department for aid. The amount distributed to the natives upon the islands of St. Paul and St. George was six thousand seven and eight-three  $\frac{30}{100}$  dollars and one thousand six hundred and forty-four  $\frac{80}{100}$  dollars, respectively. This will not be sufficient to provide them with the necessaries of life until the steamers return in the spring, especially so with the natives of the St. George Island. With this fact in view,

I made the following arrangement with the North American Commercial Company, through their manager, Mr. George R. Tingle:

The North American Commercial Company's resident agent, together with the Treasury agent in charge, are to adjudge what supplies are positively needed for the support and maintenance of the natives, the company receiving from the Treasury agent a certificate that such supplies have been furnished, but said certificate merely to be accepted as a voucher of correctness, the matter to be adjusted in the future with the Department by the North American Commercial Company.

The Department will have to make some provision for the support and maintenance of these people, as their mode of making a living has been destroyed for the present, and their future is only what the charity of the Government will make it. There is utterly nothing here upon which they can depend for a livelihood until the much wished for return of seals take place—an event too far in the future to give even a promise of better times to these unfortunate people.

Respectfully, yours,

CHARLES J. GOFF,  
*Treasury Agent in charge of the Seal Islands.*

To the Hon. WM. WINDOM,  
*Secretary of the Treasury, Washington, D. C.*

## PLAINTIFFS' EXHIBIT 42.

A. F. 351.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
Washington, D. C., March 26, 1890.

CHARLES J. GOFF, Esq.,  
*Chief Treasury Agent, Seal Islands, Alaska.*

SIR: The lease of the seal islands of St. Paul and St. George to the Alaska Commercial Company having expired, and a lease of said islands having been granted by the Secretary of the Treasury to the

303 North American Commercial Company for the term of twenty years from May 1st, 1890, you are instructed to immediately proceed to your post of duty, in order that you may arrive in San Francisco in time to sail about the 15th proximo, either on the North American Commercial Company's vessel or on one of the revenue steamers, the "Bear" or the "Rush," as you may deem advisable, it being of the utmost importance that you be present when the present lessees take charge of the islands. You will place an assistant Treasury agent on St. George Island to aid Mr. Murray in the discharge of his duties, and one on St. Paul Island to assist you. Under no circumstances are either of the islands to be left without a Treasury agent in charge. Permission, however, is granted for two of the agents, if they desire to do so, and if in your opinion, their services can be spared, to return to San Francisco after the termination of the sealing season, and upon their arrival at San Francisco they will report by wire to this Department for instructions. It will be your duty to see that the North American Commercial Company conforms faithfully to all the requirements and conditions of the lease as aforesaid (a copy of which is enclosed for your guidance); to superintend the catch of 60,000 seals for the coming season, under the rules, regulations, and decisions now on file in the Government house on St. Paul Island, with the exception that there shall be no killing of seals for skins, unless for food for the natives, from July 20th to September 30th, inclusive. You will also endeavor to prevent the killing of seals and seal pups along the Aleutian chain of islands (other than St. Paul and St. George) by the inhabitants thereof or by other persons, whether for food or otherwise, there being no law granting such privilege. And in the future the skins of such seals and pups as are killed in the bays and inlets of the Aleutian chain of islands and found in the possession of inhabitants or other persons will be forfeited to the Government.

304 The English schools on the islands of St. Paul and St. George shall be kept five days of each school week, Saturday to be considered a day of recreation to the pupils.

You will, as early as possible, ascertain and report to this Department the cost of building suitable cold-storage houses on St. Paul and St. George Islands, for the reception of sufficient seal carcasses to furnish natives seal meat during the winter, in lieu of killing seal pups for such purposes. Until otherwise instructed you will grant the natives the privilege of selling the pup skins allowed them by law, including such articles as they may manufacture from such skins, and also such other skins as they may trap and kill during the winter, provided that no con-

traband merchandise or spirituous liquors are received in exchange for them.

You will, after making a careful estimate of the quantity of fish, salt, and barrels the inhabitants of St. Paul and St. George will require, and after making a proper division between the two islands of the eighty tons of coal to be furnished by the North American Commercial Company, notify the said company, and see that they furnish the mentioned supplies and deliver them as proportioned at St. Paul and St. George Islands.

The compensation the natives are to receive for killing, salting, curing, and loading the seal skins on board the North American Commercial Company's ships is hereby fixed at forty cents per skin for the year ending April 30, 1891.

You will proportion the killing of seals between the two islands according to the condition of the rookeries, and divide the total earnings of the natives for the season's catch among them according to their respective classification, deducting the usual amount for the widows' fund.

The merchantable seal skins taken from the seals killed for food during the fall of 1889, now in the salt houses on St. Paul and St. George

Islands, you will turn over to the North American Commercial Company, provided they will accept them as part of their quota 305 (60,000) allowed by their lease for the season of 1890. Otherwise you will ship all skins per United States steamer to San Francisco, consigned to the collector of customs, to be disposed of as the Department may deem advisable. You will take the receipt of the commanding officer of the United States vessel receiving the skins and forward same to this Department.

The money now in the hands of the Alaska Commercial Company and belonging to the current expense account of St. Paul and St. George islands you will transfer to the North American Commercial Company. You will also examine the books of the Alaska Commercial Company and ascertain what sum of money they have in their possession to private account of the natives of St. Paul and St. George Islands, and make such disposition of the matter as the natives may elect.

You will, through yourself and your assistants, use every endeavor to take all necessary precautions to secure the interests of the Government and the inhabitants of the seal islands and to protect the lessees in the rights and privileges specially granted them in the lease; make careful examination daily during the sealing season as to the habits, numbers, condition, &c., of the seals, noting especially as to whether the seals are increasing or diminishing in numbers, and in your annual report to the Department, after the sealing season is over, state all particulars regarding all matters of interest, with such recommendations as you may deem pertinent for its consideration.

The report as to the condition of seal life should be particularly exhaustive, in order to enable the Department to intelligently determine what number of seals can be taken by the lessees during the ensuing season.

Of course these instructions apply also to the island of St. George, so far as may be, and a copy thereof should be furnished to the 306 assistant agent in charge, under your supervision, of that island, for his guidance.

A copy, or such extracts hereof as you may deem proper, should also be furnished to the representative of the North American Commercial Company, for his information.

Respectfully, yours,

GEORGE C. TICHENOR,  
*Assistant Secretary.*

(One enclosure.)

The foregoing contains all the evidence adduced at the trial of this action and all the exceptions taken thereat by the said defendant.

Whereupon the said counsel for the said defendant insisted then and there, before the said court, on behalf of the said defendant, that the said several matters so produced and given in evidence on the part of the said plaintiff were insufficient to entitle the said plaintiff to a decision for any sum of money whatsoever against the said defendant, and that the said complaint of the said plaintiffs ought to be dismissed, and that the said several matters so produced and given in evidence on the part of the said defendant as aforesaid were sufficient and ought to be admitted and allowed as decisive evidence to entitle the said defendant to a decision, and that the said complaint of the said plaintiffs should be dismissed, or that the said counterclaim of the said defendant should be allowed as a counterclaim or credit in this action; and said counsel for the said defendant then and there prayed the said court to admit and allow the said matters so produced and given in evidence for the said defendant to be conclusive evidence in favor of said defendant and to entitle him to a decision in this cause, and to bar the said plaintiffs of their action aforesaid; but to this counsel for the said plaintiffs did then and there

307 object and insisted before the said court that the matters so produced and given in evidence for the said defendant were not sufficient, nor ought to be admitted or allowed, to entitle the said defendant to a decision, nor to bar the said plaintiffs of their action aforesaid.

And the said court thereafter and on the 10th day of June, 1896, made and filed special findings directing judgment for the said plaintiff for the sum of ninety-four thousand six hundred and eighty-seven  $\frac{5}{100}$  dollars (\$94,687.50), with interest from the 1st day of April, 1894, and finding that by reason of the breach of the said lease by said plaintiff, prohibiting the said defendant from taking any seal skins during the year 1893, said plaintiff is liable to the said defendant for the sum of one hundred and forty-two thousand one hundred and eighty-seven  $\frac{5}{100}$  dollars (\$142,187.50), with interest thereon from the 1st day of December, 1894, but that on account of the said claim of the said defendant against the said plaintiff for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it could not be allowed as a counterclaim or credit in this action, and directing that the said counterclaim should be therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding.

And inasmuch as the said several matters so produced and given in evidence on the part of the said defendant and by its counsel objected and insisted on as a bar to the action aforesaid do not appear by the record of the said decision aforesaid, the said counsel for the said defendant did then and there propose their aforesaid exceptions to the rulings



of the said court and requested the said judge holding such court to sign  
and seal this bill of exceptions containing the said several matters  
308 so produced and given in evidence on the part of the said defend-  
ant as aforesaid, according to the form of the statute in such case  
made; and thereupon the said circuit judge, at the request of the said  
counsel for the said defendant, did sign and seal this bill of exceptions on  
this 14th day of October, 1896.

WM. J. WALLACE,  
*U. S. Circuit Judge.*

I hereby consent that the foregoing bill of exceptions be signed, sealed,  
and filed.

New York, September 30, 1896.

WALLACE MACFARLANE,  
*U. S. Attorney and Attorney for Plaintiffs.*

Circuit court of the United States for the southern district of New York.

UNITED STATES OF AMERICA	}	Action No. 1.
<i>against</i>		
THE NORTH AMERICAN COMMERCIAL COMPANY.		

Please take notice that we shall, on the 5th day of August, 1896, at  
chambers of Hon. William J. Wallace, circuit judge, in the post-office  
building in the city of New York, present the foregoing bill of excep-  
tions and such proposed amendments thereto as you may serve upon us  
prior to the 1st day of August, 1896, and shall then and there request  
the said judge to settle such bill of exceptions and to sign and  
309 seal the same and to take such other action in respect thereto as  
may be just.

Dated New York, July 21, 1896.

CARTER & LEDYARD,  
*Attorneys for Deft.*

To WALLACE MACFARLANE, Esq.,  
*United States Attorney, Attorney for the Plaintiff.*

(Endorsed:). U. S. circuit court, southern district of New York.  
United States of America against The North American Commercial  
Company. Bill of exceptions and notice. Carter & Ledyard, attys. for  
deft., 54 Wall st., N. Y. A copy of the within paper has been this day  
received at this office, July 21, 1896. Wallace Macfarlane, U. S. attorney.  
U. S. circuit court. Filed Oct. 15, 1896. John A. Shields, clerk.

United States circuit court of appeals for the second circuit.

UNITED STATES OF AMERICA, PLAINTIFF,	}	Action No. 1.
<i>against</i>		
THE NORTH AMERICAN COMMERCIAL COM- pany, defendant.		

The petition of The North American Commercial Company, the  
defendant in the above-entitled action, respectfully shows as follows:

310 First. That the said action was commenced on the 26th day of  
June, 1894, and was brought to recover the sum of one hundred  
and thirty-two thousand one hundred and eighty-seven and  $\frac{50}{100}$

dollars, with interest thereon from the first day of April, 1894, the amount claimed by the plaintiff to be due to it from the defendant under the terms of the lease from the plaintiff to the defendant, dated March 12, 1890, of the right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, for the seventy-five hundred seals that were killed on those islands during the year 1893. The answer of the defendant was filed and served September 14, 1894, and the reply to the counterclaim therein was filed and served October 19, 1894. An amended answer was filed and served December 22, 1894, and a reply to the counterclaim therein was filed and served on June 21, 1895. The issues in said action were brought to trial on January 15, 1896, before Hon. William J. Wallace, circuit judge, and the parties having stipulated in writing, dated and filed with the clerk on that day, before the trial of said action, that the issues of fact therein should be tried and determined by the court without the intervention of a jury, under sections 649 and 700 of the Revised Statutes of the United States, such issues were on that day and subsequent days tried before the said judge. That on the 10th day of June, 1896, special findings made by the said judge were duly filed, and thereafter, on the 13th day of June, 1896, judgment was duly entered in this action, adjudging that the plaintiff recover of the defendant in said action the sum of one hundred and seven thousand one hundred and eighty-six  $\frac{25}{100}$  dollars (\$107,186.25), principal and interest, together with seventy-one  $\frac{04}{100}$  dollars (\$71.04), costs and disbursements; in all, on hundred and seven thousand two hundred and fifty-seven  $\frac{29}{100}$  dollars (\$107,257.29), and that the plaintiff have execution therefor.

This defendant is advised and believes that there are manifest errors in the said findings and judgment, in that, among other things, 311 it was found that the said plaintiff was entitled to recover the sum mentioned in the said judgment from the said defendant, and that the counterclaim of the said defendant was not allowed and in other respects particularly pointed out by the said defendant's exceptions.

That this defendant, feeling aggrieved by the said findings and judgment, herewith files exceptions to such findings, and hereby prays that a writ of error may be issued by the United States circuit court of appeals for the second circuit to the United States circuit court for the southern district of New York requiring the judges of such court to send the record and proceedings in this action to the justices of the United States court of appeals for the second circuit, in the post-office building in the city of New York, at a time to be therein mentioned, and for such other and further relief as to the court may seem best.

And your petitioner will ever pray.

CARTER & LEDYARD,  
*Attorneys for Petitioner, 54 Wall street, New York.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

GEORGE H. BALKAM, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to

312 be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the said defendant is that it is a foreign corporation.

(Sd.) GEORGE H. BALKAM.

Sworn to before me this 25th day of June, 1896.

[SEAL.]

(Sd.) WALTER F. TAYLOR,  
*Notary Public, New York County.*

(Endorsed:) U. S. circuit court of appeals, second circuit. United States of America against The North American Commercial Company. Action No. 1. Petition. Carter & Ledyard, attorneys for defendant, 54 Wall street, N. Y. U. S. circuit court. Filed June 30, 1896. John A. Shields, clerk.

United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF	} Action No. 1.
below and defendant in error,	
<i>vs.</i>	
THE NORTH AMERICAN COMMERCIAL COM-	
pany, defendant below and plaintiff in error.	

The North American Commercial Company, the defendant below and the plaintiff in error in the above-entitled action, by Carter & Ledyard, its attorneys, assigns as errors in the judgment entered in the  
313 above-entitled action on the 13th day of June, 1896, and in the record and proceedings therein, the following:

First. That in and by the said judgment it is adjudged that the United States of America, the plaintiffs in this action, recover of the North American Commercial Company, the defendant therein, the sum of \$107,186.25, principal and interest, together with \$71.04, costs and disbursements; in all, the sum of \$107,257.29.

Second. That the circuit court of the United States for the southern district of New York did not in and by said judgment dismiss the complaint in the said action on the merits, for the reason that the plaintiffs failed to perform their side of the said contract, in that they wholly prohibited the said defendant from taking any seals under the lease mentioned in the complaint in the year 1893.

Third. That the said United States circuit court did not in and by the said judgment adjudge that the said defendant was entitled to have its claim for damages on account of such breach allowed as a counterclaim or set-off to the extent necessary to prevent any recovery against it by the said plaintiffs.

Fourth. That the said United States circuit court found in the 14th finding in the findings filed in this action on the 10th day of June, 1896, as follows:

"That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, twenty thousand seal skins there would have been due the said plaintiff the sixty thousand dollars rental, and for the per capita of seven dollars sixty-two and a half cents, and the revenue tax of two dollars per skin the sum of one hundred and ninety-two thousand five hundred dollars, making together the sum of two hundred

and fifty-two thousand five hundred dollars; that is, twelve  
 314 dollars sixty-two and a half cents for each seal skin taken; that  
 for the seventy-five hundred received by the said defendant as  
 above set forth, it owes to the said plaintiff the said sum of twelve dollars  
 sixty-two and a half cents apiece, amounting to the sum of ninety-four  
 thousand six hundred and eighty-seven and  $\frac{59}{100}$  dollars."

Fifth. That the said United States circuit court did not find that if  
 the said defendant had been allowed to take and had taken in the year  
 1893 under its said lease 20,000 seal skins, there would have been due  
 to the said plaintiff only such part of the \$60,000 rental and the \$7.62 $\frac{1}{2}$   
 per skin as 7,500 is of 100,000, and that it did not find that for the  
 7,500 received by the said defendant it owed the said plaintiffs as rental  
 and such per capita sum only such part thereof as 7,500 is of 100,000.

Sixth. That the said United States circuit court found in the 15th  
 finding that for the 12,500 seal skins which the said defendant might have  
 taken in the year 1893 in addition to the 7,500 killed during that year  
 the said defendant would have been liable to pay according to the terms  
 of its said lease, if it had taken 20,000 seal skins during that year, the sum  
 of \$12.62 $\frac{1}{2}$  each, amounting to \$157,812.50.

Seventh. That the said United States circuit court did not find that  
 for the 12,500 seal skins which the said defendant might have taken in the  
 year 1893 in addition to the 7,500 killed during that year this defendant  
 would have been liable to pay according to its lease only 12 1-2/20 of  
 such proportionate part of \$60,000 rental and per capita of \$7.62 1/2 on  
 20,000 seals as 20 is of 100; or, in other words, 12 1-2/20 of 1/5 of  
 such rental and per capita sum.

Eighth. That the said United States circuit court found in the 18th  
 finding as follows:

"The defendant did not present to the accounting officers of  
 315 the Treasury for their examination any claim for damages by  
 reason of the loss alleged to have been incurred by the defendant  
 by reason of the action of the United States in entering into said conven-  
 tion or *modus vivendi* with Great Britain and limiting the catch of seals  
 upon said islands to seventy-five hundred, and such claim was not dis-  
 allowed by the accounting officers of the Treasury in whole or in part,  
 and it was not proved to the satisfaction of the court that the defendant  
 was at the time of the trial of this action in possession of vouchers not  
 before in its power to procure or that the defendant was prevented from  
 exhibiting its said alleged claim at the Treasury by absence from the  
 United States or by unavoidable accident."

Ninth. That the said United States circuit court did not find that the  
 said defendant did duly present to the accounting officers of the Treasury  
 for their examination the claim for damages by reason of the loss incurred  
 by the defendant by reason of the action of the United States in entering  
 into said convention or *modus vivendi* and limiting the catch of seals upon  
 said islands to 7,500, and did not find that such claim was disallowed by  
 the accounting officers of the Treasury in whole.

Tenth. That the said United States circuit court did not find the 6th  
 finding requested by the defendant, which was as follows:

"That what was intended to be included in the general right granted  
 to the said defendant by the said lease to it was the right to engage in

what at the time of the making of that lease was known as the business and definite pursuit of taking fur seals on the said islands for their skins."

Eleventh. That the said United States circuit court did not find the 8th finding requested by the defendant, which was as follows:

316 "That it was intended in and by the said lease to the defendant to secure to the said defendant the exclusive right of taking the annual product of the seal fisheries, subject to the regulations prescribed by the statutes, and subject also to such further restrictions and limitations as the Secretary of the Treasury, in the exercise of his discretion, should deem necessary for the preservation of the fisheries, and that in the absence of such restriction by the Secretary of the Treasury said defendant's privileges were coextensive with those of the previous lessee."

Twelfth. That the said United States circuit court found as a conclusion of law the following:

"That the said defendant having received the said seventy-five hundred seal skins taken from the said islands during the year 1893, is liable to pay the said plaintiff therefor the sum of ninety-four thousand six hundred and eighty-seven and  $\frac{59}{100}$  dollars, with interest thereon from the first day of April, 1894, and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant."

Thirteenth. That the said United States circuit court did not find that the said plaintiff was not entitled to recover any sum from the said defendant in this action.

Fourteenth. That the said United States circuit court found that on account of said claim of the said defendant against the plaintiff for damages by breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it could not be allowed as a counterclaim or credit in this action, and that the said counterclaim was, therefore, dismissed.

Fifteenth. That the said United States circuit court did not find that the said claim of said defendant should be allowed as a counter-  
317 claim or credit in this action and that it did not so allow the same.

Sixteenth. That the said United States circuit court directed judgment in favor of the said plaintiff and that it did not direct judgment in favor of the said defendant.

Seventeenth. That the said United States circuit court overruled or denied the motion of the defendant made at the close of the plaintiff's case to dismiss the complaint on the ground that the said plaintiff, pursuant to the *modus vivendi*, prohibited the defendant from taking any seals in the year 1893 and thereby violated and failed to perform the conditions of the lease on its part which were conditions precedent to liability on the part of the defendant, to which decision or ruling the defendant duly excepted.

Eighteenth. That said United States circuit court sustained an objection to the question asked by counsel for the defendant of the witness W. P. Hepburn, hereinafter quoted. The witness, at the time the lease to the defendant was made, was Solicitor of the Treasury. He testified that he drew the lease; that he knew of no communications between the

intending bidders therefor and the Department in relation to the terms of the bidding other than those that were documentary, but that he remembered writing a letter, a copy of which was shown to him; that such letter was an opinion written by him as Solicitor to the Secretary of the Treasury of a question of law which the Secretary submitted to him for advice. Counsel for the plaintiff objected to the letter going in evidence on the ground that it was a privileged communication. Counsel for the defendant said he wished to show that at the time of the letting of this lease it was the universal understanding that the maximum  
 318 quota of seals to be taken each year was 100,000, and that he wanted to obtain from the witness where he got that understanding. Counsel for the defendant then asked this question:

"Q. In this letter it states 'I have the honor to say that in section 1962 is found the following language: "But the Secretary of the Treasury may limit the right of killing if it becomes necessary for the preservation of such seals with such proportionate reduction of the rents reserved to the Government as may be proper." This section also limits the maximum number of seals that may be killed for their skins upon such islands in any one year to 100,000, and the following section fixes the minimum rental at \$50,000 per annum.' Do you remember that?"

Counsel for the plaintiff: "I object to that question on the ground that counsel has no right to read that letter as a part of the question."

The objection was sustained and an exception taken by the defendant.

Nineteenth. That the said United States circuit court sustained an objection by the counsel for the plaintiff to the following question put by the counsel for the defendant to the same witness, Hepburn, who had testified that he wrote the lease or contract himself:

"Q. I call your attention to this clause in the contract: 'It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed 60,000.' What was your object in putting that limitation?"

Counsel for the plaintiff objected to that question as incompetent on the ground that the contract speaks for itself.

Objection sustained and an exception taken by the defendant.

319 Twentieth. That the said United States circuit court sustained an objection taken by counsel for the plaintiff to the question hereinafter quoted to the witness A. B. Nettleton. Witness Nettleton testified that from July 3, 1890, to November 15, 1892, he was Assistant Secretary of the Treasury, and prior to that was connected with a company intending to bid for the lease of the sealing privileges, and that such company put in a bid for this lease, and that prior to putting in such bid he had some conversation with those for whom he was acting concerning the interpretation of the advertisement of the Secretary of the Treasury, and afterwards some communications with the Secretary touching the same matter, and that such Secretary was Secretary Windom, and that he had some conversation with him concerning this letting.

By counsel for defendant:

"Q. Will you state what that was?"

Counsel for plaintiff objected to this question as incompetent, immaterial, and not apparently bearing in any way upon the issues of this



action. After counsel for the defendant stated that he wished to show that the Secretary told the witness what the practice and understanding of the Government was as to what the standard quota would be, the court sustained the objection, and an exception was taken by the defendant.

Twenty-first. That the said United States circuit court overruled the objection of the defendant to the admission of plaintiffs' Exhibits 39, 40, and 41. Charles J. Goff, the witness, testified that he was agent for the Government of these islands in the seasons of 1889 and 1890; that he made reports to the Secretary of the Treasury at conclusion of each season; that he carefully examined the condition of the seal herd

320 in those years, and that in his opinion no more seals than the number he allowed to be taken in the season of 1890 could have been taken without detriment to the herd; and that in his judgment the herd was in a very depleted condition and driven to death from the rookeries, and that the drives that were being made were not justifiable; that not a sufficient number of seals was taken to justify the drives, and the seals were being redriven over and over again.

By counsel for plaintiff:

"Q. What was your recommendation in respect to the measures that should be taken in 1890 to preserve that herd?"

The defendant's counsel objected to this question, and the counsel for the plaintiff withdrew the question and offered in evidence the witnesses' official reports of 1889 and 1890, two for 1889 and one for 1890. Counsel for the defendant objected to the same as incompetent. The court overruled the objection, and an exception was taken by the defendant. The reports referred to are marked in evidence, respectively, plaintiff's exhibits 39, 40, and 41.

Twenty-second. That the said United States circuit court sustained an objection by counsel for the plaintiff to the question hereinafter quoted put by counsel for the defendant to the witness Isaac Liebes. The witness had testified that he was president of the defendant company in 1889 and 1890, and that he put in the bids that were put in on the part of that company for this lease, and that he had interviews with Secretary Windom.

By counsel for the defendant:

"Q. In the course of those interviews was anything said by him (meaning Secretary Windom) bearing upon the matter of the regular quota which the successful bidder would have?"

321 Counsel for the plaintiff objected to the question on the same grounds urged to a similar question to the witness Nettleton, and that the evidence is not competent in view of the written contract afterwards entered into, and that the declarations of the Secretary are not binding on the Government in any respect.

The court sustained the objection and an exception was taken by the defendant.

Twenty-third. That the said United States circuit court held in effect that the act of 1870 conferred authority upon the Secretary of the Treasury after the expiration of the first period of twenty years to prescribe the conditions of leases, except in respect to the length of the term or the minimum rental, and that the provision thereof fixing the maximum

take at 100,000 seals, and requiring a proportionate reduction of rents in case the Secretary of the Treasury should reduce the take, was applicable only to the twenty-year period ending July 1, 1890.

Twenty-fourth. That the said United States circuit court held that whether such was the correct interpretation of the act of 1870, the Revised Statutes conferred such authority upon the Secretary of the Treasury after the expiration of the first twenty years, and limited the provisions fixing the maximum take and requiring a proportionate reduction of rent in case the Secretary of the Treasury should reduce the take to the period of twenty years ending July 1, 1890.

Twenty-fifth. That the said United States circuit court held that the act of March 24, 1874, in effect abrogated the provisions of the pre-existing law by which, for a period of twenty years preceding July 1, 1890, no more than 100,000 seals could be taken, and conferred upon the

322 Secretary of the Treasury full discretion as to the number to be taken, and limited the provisions for a proportionate reduction of the rents in case the Secretary of the Treasury should reduce the number to be taken to less than 100,000 to that period, and after the expiration of that period left it wholly to the Secretary of the Treasury and the exercise of his discretion to determine what number a lessee should be permitted to take, and that if he fixed that number at less than 100,000 the lessee was not entitled to a proportionate reduction of the rent.

Twenty-sixth. That the said United States circuit court held that the defendant accepted these 7,500 skins of seals killed in 1893 as a partial performance of said lease, and that it was obliged to make a commensurate compensation to the plaintiffs.

Twenty-seventh. That the said United States circuit court held that if the said defendant had taken 20,000 seal skins in the year 1893, there would have been due to the Government the full rental of \$60,000 and the full per capita of \$7.62½, without any proportionate reduction thereof, and also the revenue tax of \$2 per skin.

Twenty-eighth. That the said United States circuit court held that the act of July 31, 1894, required the claim of the defendant for damages on account of the enforcement of the *modus vivendi* in the year 1893 to be presented to the Auditor of the Treasury Department.

Twenty-ninth. That the said United States circuit court held that the claim of the said defendant was an account within the meaning of the provision of the said act of July 31, 1894; that the Auditor of the Treasury shall receive and examine all accounts relating to the Alaskan fur-seal fisheries.

323 Thirtieth. That the said United States circuit court held that such claim of the said defendant was a public account within the meaning of the provision of the said act; that balances certified in accordance with the provisions of such act upon the settlement of the public accounts should be final and conclusive upon the executive branch of the Government, and held that the presentation of the defendant's claim to the Secretary of the Treasury was not a compliance with the provisions of that act.

Thirty-first. That the said United States circuit court did not hold that the Secretary of the Treasury was the supreme accounting officer of

the Treasury Department, except where otherwise prescribed by statute, and that in respect to this claim of the said defendant there was no such statutory provision.

Wherefore, on account of such errors, this defendant and plaintiff in error prays that the said judgment may be reversed, and a judgment rendered dismissing the complaint of the said plaintiff on the merits, or that the said judgment may be reversed and a new trial granted, with costs.

Dated New York, June 27, 1896.

CARTER & LEDYARD,  
*Attorneys for the Defendant and Plaintiff in Error,*  
54 Wall Street, New York City.

(Endorsed :) U. S. circuit court of appeals for the second circuit. The United States of America vs. The N. A. Commercial Company. Action Number 1. Assignment of errors. Carter & Ledyard, attorneys for defendant, 54 Wall Street, N. Y. U. S. circuit court. Filed June 30, 1896. John A. Shields, clerk.

324 United States circuit court of appeals for the second circuit.

UNITED STATES OF AMERICA	}	Action No. 1.
<i>vs.</i>		
THE NORTH AMERICAN COM- mercial Company.		

The North American Commercial Company, the defendant below and plaintiff in error in the above-entitled action, by Carter & Ledyard, its attorneys, makes this additional assignment of errors in the judgment entered in the above-entitled action on the 13th day of June, 1896, as modified by an order entered the 16th day of July, 1896, and in the record and proceedings therein as follows:

First. That the said judgment dismissed the counterclaim of the said defendant.

Second. That the United States circuit court at the trial of this action excluded the proof offered by the defendant, namely, the testimony of the witness William P. Hepburn, to the effect that Secretary of the Treasury Windom told him that the normal and standard quota of seals to be taken was 100,000 per year for all years except as otherwise specified. Counsel for the defendant offered such proof. Counsel for the plaintiff objected to it as incompetent, and the court sustained the objection and excluded the testimony; and an exception was then and there taken by the defendant, the court stating that it was not necessary to recall the witness for the purpose of putting the question to him, answering, "I will exclude the evidence and give the defendant an exception."

Wherefore, this defendant prays as in his former assignment of errors, &c.

CARTER & LEDYARD,  
*Attys. for Defendant, 54 Wall Street, New York City.*

(Endorsed :) U. S. circuit court of appeals for the second circuit. United States of America vs. The North American Commercial Com-

pany. Action No. 1. Additional assignment of errors. Carter & Ledyard, attys. for deft., 54 Wall street, N. Y. U. S. circuit court. Filed July 22, 1896. John A. Shields, clerk.

Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
*against*  
 THE NORTH AMERICAN COMMERCIAL COMPANY, } Action No. 1.  
 defendant.

Know all men by these presents, that we, Darius O. Mills, residing at 634 Fifth avenue, in the city, county, and State of New York, and  
 326 James B. Haggin, residing at 587 Fifth avenue, in the said city of New York, are held and firmly bound unto the above-named United States of America, the plaintiff in the above-entitled action, in the sum of one hundred and ten thousand dollars (\$110,000), to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 18th day of June, 1896.

Whereas, on the 13th day of June, 1896, a judgment was entered in the above-entitled action, whereby it was adjudged that the said United States of America, the plaintiff therein, recover of the North American Commercial Company, the defendant therein, the sum of one hundred and seven thousand one hundred and eighty-six  $\frac{25}{100}$  dollars (\$107,186.25), principal and interest, together with seventy-one dollars and four cents (\$71.04) costs and disbursements; in all the sum of one hundred and seven thousand two hundred and fifty-seven  $\frac{25}{100}$  dollars (\$107,257.25); and,

Whereas the said defendant is about to apply for a writ of error for the purpose of having the said judgment reviewed and reversed by the United States circuit court of appeals for the second circuit;

Now, therefore, the condition of this obligation is such that if the above-named defendant, the North American Commercial Company, shall prosecute its said writ of error or appeal to effect, and if it fail to make its plea good shall answer all the damages, including just damages for delay and costs and interest on the said writ of error or appeal, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

D. O. MILLS. [L. S.]  
 J. B. HAGGIN. [L. S.]

327 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

On this 18th day of June, 1896, before me personally appeared Darius O. Mills and James B. Haggin, to me known, and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

[L. S.]

WALTER F. TAYLOR,  
*Notary Public, New York County.*

UNITED STATES OF AMERICA,

*Southern District of New York, City and County of New York, ss:*

Darius O. Mills, being duly sworn, says: That he is one of the obligors in foregoing bond; that he resides at 634 Fifth avenue, in the city, county and State of New York, and that he is a freeholder in said city, and that he is worth, in good property, twice the amount of the judgment mentioned in the foregoing bond, over and above all his just debts and liabilities and property exempt by law from levy and sale under execution.

D. O. MILLS.

Sworn to before me this 18th day of June, 1896.

[L. s.]

WALTER F. TAYLOR,  
Notary Public, New York County.

UNITED STATES OF AMERICA,

*Southern District of New York, City and County of New York, ss:*

James B. Haggin, being duly sworn, says: That he is one of the obligors in the foregoing bond; that he resides at 587 Fifth avenue, in the city, county and State of New York, and that he is a freeholder in said city, and that he is worth, in good property, twice the amount of the judgment mentioned in the foregoing bond, over and above all his just debts and liabilities and property exempt by law from levy and sale under execution.

J. B. HAGGIN.

Sworn to before me this 18th day of June, 1896.

[L. s.]

WALTER F. TAYLOR,  
Notary Public, New York County.

(Endorsed:) Darius O. Mills and James B. Haggin to United States of America. Bond. Carter & Ledyard, att'ys for def., 54 Wall st., New York. Approved June 30/96. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed June 30, 1896. John A. Shields, clerk.

United States circuit court of appeals for the second circuit.

UNITED STATES OF AMERICA, PLAINTIFF,  
*against*

THE NORTH AMERICAN COMMERCIAL COMPANY,  
defendant.

} Action No. 1.

By the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York, to the United States of America, the plaintiff above named, greeting:

Whereas, the North American Commercial Company, the defendant in the above-entitled cause, has sued out a writ of error from the United States circuit court of appeals for the second circuit to the United States circuit court for the southern district of New York, to review and reverse the judgment entered in the above-entitled action on the 13th day of June, 1896, for the sum of one hundred and seven thousand two hundred and fifty-seven  $\frac{29}{100}$  dollars

(§107,257.29), you are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, to be holden in the city of New York on the 30th day of July, 1896, the time and place to and at which the said writ of error is returnable, to show cause, if any there be, why the said judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf, and to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the city of New York, on the 30th day of June, 1896.

E. H. LACOMBE,  
*U. S. Circuit Judge.*

(Endorsed:) U. S. circuit court of appeals, second circuit. United States of America against The North American Commercial Company. Action No. 1. Citation. Carter & Ledyard, attys. for defendant, 54 Wall street, N. Y. A copy of the within paper has been this day received at this office, Jul. 22, 1896. Wallace Macfarlane, U. S. attorney. U. S. circuit court. Filed Jul. 22, 1896. John A. Shields, clerk.

330 United States circuit court of appeals, second circuit.

Present: Lacombe, circuit judge; Shipman, circuit judge; Townsend, district judge.

THE NORTH AMERICAN COMMERCIAL COMPANY,	}
plaintiff in error,	
<i>vs.</i>	
THE UNITED STATES, DEFENDANT IN ERROR.	}

*Certification of questions to the Supreme Court, under act of March 3, 1891.*

This case came before this court on May 10, 1897, upon a writ of error sued out by defendant below, to review a judgment of the U. S. circuit court, southern district of New York, in favor of the plaintiff below, defendant in error. The judgment was entered June 13, 1896, for \$107,257.29, being for \$94,687.50, with interest and costs. The case was tried in the circuit court by the court without a jury, under sections 649 and 700 of the U. S. Revised Statutes and findings of fact and conclusions of law duly made and filed. The plaintiff below, the United States, took no proceedings to review the judgment of the circuit court by writ of error or otherwise.

331 Argument being had upon the writ of error, certain questions of law developed, concerning which this court desires the instruction of the Supreme Court for its proper decision.

#### STATEMENT OF FACTS.

The facts in the case, so far as they bear in any way upon the questions certified, are as follows:

The action is to recover rent for the year 1893 accruing under a lease executed March 12, 1890. By that lease the Secretary of the Treasury,



in pursuance of statutes of the United States, leased to the North American Commercial Company (hereinafter styled the defendant), for a term of twenty years from May 1, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals. By the same instrument defendant agreed to pay a certain gross sum as annual rental and also certain other sums for each fur skin taken and shipped. After the making of said lease defendant entered upon the enjoyment of the right thereby granted, and certain disputes which arose between the parties, touching the amounts to be paid by defendant for the years 1891 and 1892, were amicably adjusted between the parties.

The United States, during the year 1893, prohibited and prevented defendant from taking any fur seals whatever on said islands and thus deprived defendant of the benefit of its said lease, but during said year 1893 the United States itself, through agents of the Treasury Department, took upon the said islands 7,500 seals, and defendant was  
332 permitted to cooperate in selecting the seals so killed, and to take, and it did take and retain, the skins of those seals. And for the 7,500 skins so taken and retained defendant has not paid.

In consequence of the breach of its contract by the United States during the year 1893, defendant sustained a considerable loss, for which it makes a claim against the Government. And in this action, brought to recover rent under the contract for the year 1893, it seeks to recoup or set off, to the extent of plaintiff's claim only, the damages it has sustained by reason of plaintiff's failure to carry out such contract during the same year according to its terms.

On November 27, 1895, M. L. Jeffries, attorney for the said defendant, wrote and caused to be sent to the Secretary of the Treasury a letter stating that the said defendant presented the same as its claim for damages against the United States in the sum of \$283,725, through the Secretary of the Treasury, to the proper accounting officers of the Department of the Treasury, for examination and allowance, and that the said defendant was the lessee under its said lease, a copy of which was stated to be annexed to the said letter, and that by the terms thereof the United States had leased to the said defendant the exclusive right to engage in the business of taking fur seals on the said islands; and also stating the agreements on the part of the said defendant under the said lease, and that it might have taken 30,000 fur seals in the year 1893, and  
333 that it was prohibited by the United States from taking any fur seals on the said islands during that year, and that it incurred large expenses, and that it had faithfully performed its agreement, and that by reason of the United States having prohibited said defendant from taking any seals in that year said defendant had sustained a loss in the said sum of \$283,725; and also stating that that communication was respectfully submitted for the consideration of the accounting officers of the Treasury Department. On or about December 24, 1895, the Assistant Secretary of the Treasury wrote and caused to be sent to the said N. L. Jeffries a letter addressed to him as attorney for the said defendant, in which he referred to the said letter of the said Jeffries to the Secretary of the Treasury, dated November 27, 1895, and stated that the claim made by that letter was thereby rejected.

The defendant did not present to the accounting officers of the Treasury, for their examination, any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States limiting the catch of seals upon the said islands to 7,500; and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident.

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## QUESTION CERTIFIED.

Upon the facts above set forth the question of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

"Is defendant entitled to set off or recoup against plaintiff's claim to recover under the lease for the skins taken in the year 1893 whatever damages defendant sustained by reason of any breach of contract by plaintiff occurring during the same year, when such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim, as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff?"

In accordance with the provisions of section 6 of the act of March 3, 1891, establishing courts of appeal, &c., the foregoing question of law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

Witness:

E. HENRY LACOMBE,  
*Circuit Judge.*

N. SHIPMAN,  
*\* Circuit Judge.*

WM. K. TOWNSEND,  
*District Judge.*

June , 1897.

335 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 334, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The North American Commercial Company, plaintiff in error, against The United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of September, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and seventy-first.

[SEAL.]

WM. PARKIN, *Clerk.*

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## UNITED STATES OF AMERICA, SS:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Being informed that there is now pending before you a suit in which The North American Commercial Company is plaintiff in error and The United States is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

338 (Indorsed:) Supreme Court of the United States. No. 431, October term, 1897. The North American Commercial Co. vs. The United States. Writ of certiorari.

339 In the Supreme Court of the United States. October term, 1897.

NORTH AMERICAN COMMERCIAL COMPANY,  
 plaintiff in error,  
*vs.*  
 THE UNITED STATES.

No. 431.

*Stipulation as to return of writ of certiorari.*

It is hereby stipulated by the counsel for the parties to the above-entitled cause that the transcript of the record in the said cause, now on file in the Supreme Court of the United States, may be taken as the return of the clerk of the circuit court of appeals for the second circuit to the writ of certiorari issued herein.

*Counsel for Plaintiff in Error.*

J. K. RICHARDS,

*Solicitor-General.*

CARTER &amp; LEDYARD,

*Attorneys for Deft.*

A true copy.

[SEAL.]

WM. PARKIN, *Clerk.*

340 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the

clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, December 16th, 1897.

[SEAL.]

WM. PARKIN,  
*Clerk of the United States Circuit Court of Appeals,  
for the Second Circuit.*

341 (Indorsed:) United States circuit court of appeals, second circuit. North American Commercial Co. vs. The United States. Return to writ of certiorari. (Orig.)

(Indorsement on cover:) Case No. 16644. Supreme Court U. S. October term, 1897. Term No. 431. The North American Commercial Company, plff. in error, vs. The United States. Writ of certiorari and return. Office Supreme Court U. S. Filed Dec. 18, 1897. James H. McKenney, clerk.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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THE NORTH AMERICAN COMMERCIAL Company, plaintiff in error, v. THE UNITED STATES, DEFENDANT in error.	} No. 431.
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**APPLICATION UNDER SECTION 6 OF THE ACT OF MARCH 3, 1891,  
AND RULE 37, SUBDIVISION 2, OF THE RULES OF THE SUPREME  
COURT OF THE UNITED STATES FOR AN ORDER THAT THE  
WHOLE RECORD AND CAUSE BE SENT UP TO THIS COURT FOR  
CONSIDERATION IN A CAUSE IN WHICH ONE QUESTION HAS  
BEEN CERTIFIED TO THIS COURT BY THE CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT; AND MOTION TO ADVANCE.**

The Solicitor-General, on behalf of the United States, respectfully prays that a writ issue to the United States circuit court of appeals for the second circuit to require the whole record and cause in the above-entitled case to be certified and sent up to this court for review and determination, pursuant to the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals," etc., approved March 3, 1891.

A question arising in the cause has been certified to this court by the circuit court of appeals for the second circuit under the following clause of section 6 of said act:

Except that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instructions of that Court for its proper decision.

The present application is made under the next succeeding clause of said act, reading:

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The cause in question is an action at law, in which judgment was rendered for the United States, the original plaintiffs, in the United States circuit court for the southern district of New York, for \$107,257.29. A counterclaim interposed by defendant, plaintiff in error, was disallowed. The case was tried in the circuit court without a jury, under sections 649 and 700 of the United States Revised Statutes, and findings of fact and conclusions of law duly made and filed. It was taken to the circuit court of appeals for the second circuit by the North American Commercial Company, by writ of error, was argued there on May 10, 1897, and on July 21,



1897, a question relative to the counterclaim was certified to this court by the circuit court of appeals.

The certificate of the circuit court of appeals is printed as an appendix hereto.

#### STATEMENT OF FACTS.

On the 12th day of March, 1890, the United States, by William Windom, Secretary of the Treasury, leased to the North American Commercial Company for twenty years from the 1st day of May, 1890, "*the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.*" The lessee agreed:

To pay to the Treasurer of the United States each year during the said term of twenty years, as *annual rental*, the sum of sixty thousand dollars; and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay to the said Treasurer the further sum of seven dollars sixty-two and a half cents apiece for each and every fur-seal skin taken and shipped from said islands. (R., Third Finding, fol. 116.)

By the terms of the lease these payments became due and payable on or before the 1st day of April of each and every year during the existence of the lease. The complaint alleged that the defendant, during the year 1893, took and shipped, pursuant to the lease, 7,500 fur-seal skins from the islands, and that, therefore, on the

1st day of April, 1894, pursuant to the terms of the lease, there was due and payable from the defendant :

As annual rental.....	\$60,000.00
Revenue tax, 7,500 fur-seal skins taken and shipped, at \$2 .....	15,000.00
7,500 fur-seal skins at \$7.62½ apiece .....	57,187.50

Amounting in all to the total sum of ..... 132,187.50

Upon this sum interest was claimed from April 1, 1894. (R., fol. 18.)

The defendant having failed to pay this amount on demand, this action was brought to recover the same.

This action is one of a series of actions brought by the United States against the defendant corporation arising from the divergent views of the parties in respect to the construction of the lease and the statutes pursuant to which the lease was made as affecting the amount of the payments annually due under the lease to the United States.

The actions now pending are :

(1) The present action for rentals, royalties, and taxes due April 1, 1894, now pending in the circuit court of appeals and the subject of the present application. Amount of judgment.....	\$107,257.29
(2) For rentals, royalties, and taxes due April 1, 1895.	214,298.37
(3) For rentals, royalties, and taxes due April 1, 1896.	204,375.00
(4) For rentals, royalties, and taxes due April 1, 1897.	348,750.00
Total.....	874,680.66

The amounts stated in actions 2, 3, and 4 are exclusive of interest. The total principal and interest already largely exceeds \$900,000.

It will appear that until the questions involved in this action are settled a new action will undoubtedly be com-

menced every year for the rentals, royalties, and taxes due to the United States from the North American Commercial Company on April 1 of each and every year during the term of the lease, which does not expire until May 1, 1910. In the meantime the United States are deprived entirely of revenue from the Pribilof Islands, and the circuit court will not permit any of the subsequent actions to be tried while the present action, involving all the important questions, is pending on appeal, the final decision of which will in all probability finally determine the entire controversy.

It appears that the islands of St. George and St. Paul, mentioned in the lease, became possessions of the United States by the Alaska cession from Russia in 1868. In 1870 Congress passed the act of July 1, 1870, chapter 189 (16 Stat. L., 180), entitled "An act to prevent the extermination of fur-bearing animals in Alaska." This act provided that the privilege of taking fur seals on these islands should be leased to responsible parties by the Secretary of the Treasury for a period not less than twenty years, and that, on the expiration of that lease, other leases for a period of twenty years should be made.

The islands were made a Government reservation, and strict provisions of law were enacted to secure to the lessee the privileges made the subject of the lease and to preserve the fur-seal fishery. In 1874 this act and certain earlier statutes were incorporated in the Revised Statutes as chapter 3 of Title XXIII, sections 1954-1976.

The first lease was made under the act of July 1, 1870, to the Alaska Commercial Company, and was dated as

of May 1, 1870. On the expiration or surrender of that lease the present lease, dated May 1, 1890, was made to the North American Commercial Company. The present lease recites that it is made "in pursuance of chapter 3 of Title XXIII, Revised Statutes." (R., fol. 115.)

The evidence shows that prior to 1890, probably by reason of what is known as open-sea or pelagic sealing, the seals on the islands were rapidly diminishing in numbers.

As a result of the rapid and startling depletion of the fur seals on the islands, an agreement was entered into with Great Britain, known as a *modus vivendi*, first proclaimed by the President on June 15, 1891 (27 Stat. L., 980). By this agreement the President, on behalf of the United States, agreed to prohibit the killing of fur seals by citizens of the United States in Bering Sea and upon the islands of St. George and St. Paul, "except 7,500 to be taken on the islands for the subsistence and care of the natives." Great Britain, on its part, agreed to prohibit fur sealing by subjects of Great Britain in Bering Sea during the continuance of the *modus*.

This *modus vivendi* was by its terms to last one year. An arbitration agreement, however, had not been effected at the expiration of that year, but in May, 1892, the United States and Great Britain agreed upon a convention to arbitrate their differences in Bering Sea arising out of the efforts of the United States to preserve the fur seals. As that convention contemplated an arbitration which would necessarily occupy some time, another *modus vivendi* was entered into of the same date, May 9, 1892. (27 Stat. L., p. 952.)

This was ratified by the Senate on April 19, 1892, and proclaimed on May 9 of that year. It continued until the fall of 1893. This *modus* describes itself in the preamble as a "*restrictive regulation for seal hunting*" during the pendency of such arbitration. It was a renewal of the *modus vivendi* of the year 1891. There is this difference between it and the *modus* of 1891—namely, that the first *modus* was never ratified by the Senate, while the second *modus* was ratified by the Senate and became a treaty.

#### THE STATUTES AFFECTING THE CASE.

Section 3 of the act of July 1, 1870 (16 Stat. L., 180), provides as follows:

SEC. 3. *And be it further enacted*, That for the period of twenty years from and after the passage of this act the number of fur seals which may be killed for their skins upon the island of Saint Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of Saint George is hereby limited and restricted to twenty-five thousand per annum: *Provided*, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section he shall, upon due conviction thereof, be punished in the same way as provided herein for the violation of the provisions of the first and second sections of this act.

This section was incorporated in Revised Statutes, 1962, which is as follows:

SEC. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of Saint Paul is limited to seventy-five thousand per annum and the number of fur seals which may be killed for their skins upon the island of Saint George is limited to twenty-five thousand per annum, but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper, and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

\* \* \* \* \*

SEC. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

Section 4 of the act of July 1, 1870 (16 Stat. L., 180), is as follows:

SEC. 4. *And be it further enacted*, That immediately after the passage of this act the Secretary of the Treasury shall lease, for the rental mentioned in section six of this act, to proper and responsible parties, to the best advantage of the United States,



having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade and the protection of the seal fisheries, for a term of twenty years from the first day of May, eighteen hundred and seventy, the right to engage in the business of taking fur seals on the islands of Saint Paul and Saint George, and to send a vessel or vessels to said islands for the skin of such seals, giving to the lessee or lessees of said islands a lease duly executed, in duplicate not transferable, and taking from the lessee or lessees of said islands a bond, with sufficient sureties, in a sum not less than five hundred thousand dollars, conditional for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith. And in making said lease, the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance and education of the natives thereof. The said lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue officers for the time being who may be in charge at the said islands as the authority of the party for landing and taking skins.

This section of the act of July 1, 1870, was incorporated in section 1963 of the Revised Statutes, which is as follows:

SEC. 1963. When the lease heretofore made by the Secretary of the Treasury to "The Alaska Commercial Company" of the right to engage in taking

fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July 1, 1870, chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease, to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comforts, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals, for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable.

On March 24, 1874, the following act was passed:

CHAP. 64. An act to amend the act entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy.

*Be it enacted, etc.,* That the act entitled "An act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy, (1) is hereby amended so as to authorize the Secretary of the Treasury, and he is hereby authorized, to designate the months in which fur seals may be taken for their skins on the islands of Saint Paul and Saint George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island, respectively. (March 24, 1874, 1 Supp. R. S., 6.)

## THE POSITIONS TAKEN BY THE PLAINTIFF IN ERROR.

On behalf of the North American Commercial Company it was claimed:

(1) That, although by the express terms of section 3 of the act of July 1, 1870, and of Revised Statutes, 1962, the designation of a maximum number of seals to be taken on each island was limited to twenty years from July 1, 1870, still this designation of a maximum number, with the accompanying provision for a proportionate reduction of rental if the Secretary allowed a maximum of less than 100,000, applied to all subsequent leases as well; and if the 7,500 skins actually received and shipped during 1893 by the lessee were taken under the lease the United States could recover rent only in the proportion of a catch of 7,500 to a total catch of 100,000, and the rental should be reduced accordingly. In making this reduction the lessee claimed that both the specified "annual rental" of \$60,000 and the "further sum" of \$7.62½ for each and every seal skin taken from the islands should be deemed rental, and should be reduced according to the rule contended for (Answer, Sub. Third, R., fol. 39). It therefore tendered to the United States before action brought \$23,789.50 (see Answer, R., fols. 52, 53).

(2) That the *modus vivendi* operated as a total suspension of the benefits of the lease; that by reason thereof the United States prohibited the lessee from taking any skins *under the lease* during the season of 1893, and that, therefore, the complaint should be dismissed.

(3) The defendant's counterclaim (Answer, R., fols. 46-55), is based upon the *modus vivendi* or treaty of 1892, the claim being that this treaty was a breach of contract by the United States; that 30,000 seals could have been taken, but the United States, pursuant to the treaty, allowed the lessee only 7,500, to the damage of the lessee in the sum of \$283,725.

#### THE POSITIONS TAKEN BY THE DEFENDANT IN ERROR.

For the United States, now the defendant in error, it was contended that the provisions of section 3 of the act of July 1, 1870, afterwards section 1962 of the Revised Statutes, prescribing a maximum number of seals to be taken in each year upon the islands of St. Paul and St. George, were, by the express terms of those statutes, limited to twenty years from the 1st day of July, 1870. After that date there was no maximum limitation by statute restricting the number of seals which could be taken annually upon these islands. It was contended further for the United States that the proviso in section 3 of the act of July 1, 1870, repeated in Revised Statutes, 1962, to wit, "*but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper,*" was also limited to twenty years by the same statute, being inseparable from the principal clause of the sections in which it was enacted. Furthermore, it was contended for the United States that by an act of Congress passed on March 24, 1874 (1 Supp. R. S., p. 6), the maximum-number provision of section 3 of the act of July 1, 1870,

and of Revised Statutes, 1962, was repealed, and a discretionary power was vested in the Secretary of the Treasury to designate the number of seals to be taken on or about each island, respectively.

According to the contention of the United States, under this present lease it was left to the Secretary of the Treasury to determine the maximum number of seals to be taken by the defendant in any year, *and the covenants of the lease were made to conform to this view of the Secretary's power*, the lessee expressly agreeing not to kill in any year a greater number of seals than is authorized by the Secretary of the Treasury.

In respect to the effect of the *modus vivendi* upon such a contract as this lease, it was contended for the United States, on the evidence, that the number limited by that treaty, to wit, 7,500 seals, was not binding upon the Secretary of the Treasury, but was adopted by him and assigned by him as the quota which the North American Commercial Company might lawfully take in the season of 1893. It was argued also that if the Secretary's power to fix the number to be taken was suspended by the treaty, the lessee did take, accept, and retain these 7,500 skins as, at least, a partial quota under the contract. The circuit court rejected the former but approved the latter proposition.

The Government contended also that on no permissible view of the lease and statutes can the lessee obtain a reduction of the royalty of \$7.62½ for each and every fur-seal skin shipped by it from the islands.

The difference is very great in the amount of reduction. On the lessee's theory the Government would

receive \$23,789.50. By confining the reduction to the specified rental the Government would receive:

Rent, 7,500 skins at \$0.60.....	\$4,500
Royalty, 7,500 skins at \$7.62½.....	57,187
Tax, 7,500 skins at \$2.....	15,000
Total.....	<u>76,687</u>

#### THE SET-OFF OR COUNTERCLAIM.

The counterclaim is based on the alleged effect of the *modus vivendi* upon the lease. As, of course, no affirmative recovery on a counterclaim can be allowed against the United States, the question becomes one in respect to the right of the lessee to set off its damages against the sum which the United States is entitled to recover.

The circuit court held that the treaty was a breach of the contract entitling the lessee to damages; that even a claim of such a nature as to depend upon discretion and the exercise of judicial judgment was within Revised Statutes, 951, but that the conditions of that section in respect to the presentation of the claim to the accounting officers of the Treasury had not been complied with, and that, therefore, the lessee could not set off the demand, but must bring an action pursuant to law.

On this point it was contended for the United States:

A. There can be no set-off against the United States in actions at law in which it is plaintiff except under Revised Statutes, 951. The claimant, who has not complied with the conditions of that section or whose claim is not within its scope, must have recourse to a separate action.

B. The demand set up as a counterclaim was never presented to the accounting officers of the Treasury and



was never disallowed by them, as required by Revised Statutes, 951.

C. Allowance of credits under Revised Statutes, 951, can be had as a set-off against the United States only in cases where the damages are liquidated. Unliquidated damages can be recovered only by a resort to Congress, or, in a proper case, to the Court of Claims, or, under the Tucker Act, upon strict compliance with its jurisdictional requirements in the circuit and district courts, or by means of the method of compromise provided for in section 3469, Revised Statutes.

#### THE DECISION OF THE CIRCUIT COURT.

The findings and opinion of the court show that the court fully adopted the Government's theory in respect to the true construction of the lease, namely, that the provisions of section 3 of the act of July 1, 1870, reenacted in Revised Statutes, 1962, prescribing a maximum number of seals to be killed on each island, and providing that for any reduction of the number by the Secretary a proportionate reduction of rent should be made, were limited to twenty years from July 1, 1870, and have no application to the lease made in 1890 to the North American Commercial Company.

The court found, also, that the lessee did take, receive, and retain the *skins* of 7,500 seals and did cooperate with the Government agents in selecting the seals to be killed, and did recognize that these skins were taken by it *under the lease* by paying to the natives the sum of 50 cents per skin, fixed by the Secretary pursuant to the power reserved to him in the contract (twelfth finding).

Having determined this, it was left for the court to fix the value of this part ~~of the~~ performance and to consider the lessee's claim for damages.

The court found on conflicting evidence that 20,000 seals could have been taken during the year 1893 without detriment to the fishery, and assumes that the Secretary would have allowed this number had the discretion vested in him by the lease not been suspended by the treaty. (Thirteenth Finding, R., fols. 132, 133.)

Assuming 20,000 seals as full performance by the Secretary, and applying to that number the full rental, tax, and royalty according to the terms of the lease, the court finds that such full performance would have entitled the United States to \$252,500, or \$12.62½ for each of 20,000 skins. The partial performance accepted by the lessee amounted, therefore, to 7,500 skins at \$12.62½ each, in all \$94,687.50.

From this, therefore, the first conclusion of law (R., fol. 141) necessarily followed, to wit, that the lessee was liable for that sum with interest.

The court having decided that the lessee had accepted as a partial performance of the contract by the Government the 7,500 skins allowed by the *modus vivendi*, necessarily on its theory of the case, treated the action of the Secretary and the United States under that treaty in restricting the catch, not as a bar to the action entitling the plaintiff in error to a dismissal of the complaint, but as a breach of contract to be compensated in damages.

The court found that the market value of skins in 1893 was \$24 each, and that if the lessee had received

permission to take 20,000 skins, the net results, deducting the additional payments which would have been due the Government, would have amounted to \$142,187.50. But the court held also that the lessee could not set off any part of this sum against the amount the United States was entitled to receive, because the only authority for set-off against the United States in actions by it was under Revised Statutes, 951, with the terms of which the lessee had not complied. (Findings Sixteen and Eighteen, R., fols. 137-140.)

Judgment was therefore rendered for the United States for the sum which the court found the lessee owed for the 7,500 seal skins taken by it, and the lessee was relegated to the Court of Claims to prosecute there its demand for damages.

REASONS WHY THE WHOLE CAUSE SHOULD BE  
BROUGHT TO THE SUPREME COURT.

The foregoing statement shows that the question involved in respect to the lease and the statutes are not peculiar to this action alone, but affect all the other pending actions and the whole unexpired term of the lease. Several millions of dollars are therefore involved.

Only one question in the case at bar is peculiar to this action; that is, the effect of the *modus vivendi* of 1892 on the obligations of the parties under the lease. The *modus vivendi*, however, expired in October, 1893, and has no application to subsequent years. But the whole question of the rights of the Government and its lessee, and of the revenue which the former is lawfully entitled

to receive, depends on the construction to be given to the lease and the statutes hereinbefore quoted. The lease is still in force, and the lessee is annually taking large numbers of seals and will undoubtedly continue to do so during the term of the lease. But the difference between the parties is so great that no amount that the Secretary of the Treasury will accept will be tendered by the lessee until the final decision of the question of construction by the Supreme Court. Unless, therefore, the Supreme Court orders the whole cause to be sent up now the controversy may be protracted for years.

The cause is one in which an appeal to the Supreme Court lies as a matter of right. The amount involved exceeds \$1,000, and the subject of the action is not within the final jurisdiction of the circuit court of appeals. Should there be a reversal by that court, the Government must go back for a new trial, because the order of reversal will not in any probability be a final determination, but will order a new trial. Should there be an affirmance, the lessee will undoubtedly appeal to the Supreme Court. Should the cause be determined on the incidental question of the set-off alone, either in the circuit court of appeals or the Supreme Court, or in both, the Government must proceed to try another action to which the *modus vivendi* does not apply before the construction of the lease and the statutes will be determined and the rights of the parties settled. Thus years may elapse before the Government receives any revenue from this valuable public property, while the indebtedness of the lessee to the United States, already very great, will go on climbing up into millions.

The reasons for granting the application may be summed up as follows :

- (a) In view of the nature of the action.
- (b) The very large amount of money involved.
- (c) The desirability of preventing multiplicity of actions and much needless litigation.
- (d) The desirability of preventing the same action from being brought to the Supreme Court repeatedly.
- (e) The difficulty of deciding properly and finally even the single question certified to this court unless the court has the whole record before it.
- (f) The importance of the public question involved to the executive branch of the Government.

Enough has already been stated in respect to (a) the nature of the suit, (b) the amount of money involved, (c) the multiplicity of actions and the needless litigation which will ensue if the controversy is protracted, and (d) the desirability of preventing the same action from being brought to the Supreme Court repeatedly.

(E.) *The difficulty of deciding properly even the question certified on the certification and statement of facts prepared by the circuit court of appeals.*

It will appear that it is not improbable that on this certificate the Supreme Court may decide the question certified in one way, and make a contrary decision on that very question when the whole record eventually comes before it.

The circuit court of appeals for the second circuit on its own motion certified the question of the allowance of

the counterclaim to this court, and prepared the certification papers. It is submitted that the statement of facts does not contain all the material facts necessary for a final determination of the question whether the set-off should be allowed. The question certified itself is very broad :

Is defendant entitled to set-off or recoup against plaintiff's claim to recover under the lease for the skins taken in the year 1893, whatever damages defendant sustained by reason of any breach of contract by plaintiff occurring during the same year, when such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim, as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff?

But it is submitted that if this court should determine the question upon the certificate, the case may be brought, immediately after the circuit court of appeals has followed this court's instructions, to this court again, on writ of error, and a different conclusion reached upon the original record in regard to the set-off.

(1) The statement of facts is silent as to the question of the amount of damages which the circuit court determined was due to the defendant from the United States, although it states that the claim presented to the Secretary of the Treasury was for \$283,725. The Record shows that the amount which the court awards to defendant on account of this breach of contract was \$142,187.50. (Transcript of Record, p. 45.) The question thus arises whether, even if presentation to and disallowance of the claim by the Assistant Secretary of the



Treasury would be a sufficient compliance with Revised Statutes 951, it would be a sufficient compliance with that section to present a claim for \$283,725 and secure its disallowance where the party is entitled to only \$142,187.50.

(2) The statement of facts is silent on the question whether the letter making this claim was or was not accompanied by a statement of items and vouchers bearing upon it, yet it has been held that there is no adequate compliance with Revised Statutes, 951, without such statement of vouchers and items. (*Watkins v. United States*, 9 Wallace, 759; *United States v. Lamon* (supreme court District of Columbia), 3 McArthur, 204.) The Record shows that there were no such accompanying statements of items or vouchers.

(3) The statement of facts is silent as to the nature of the claim presented, and contains no particulars from which it can be made to appear whether or not the claim setting forth the breach of contract is an "account" within the meaning of Revised Statutes, 951. Claims for unliquidated damages, the United States contend, are not "accounts." It was vigorously contended on behalf of the United States in the circuit court of appeals that the accounting officers, and consequently also the circuit court, under Revised Statutes, 951, have no jurisdiction to pass on any claims except "accounts" in the technical sense of the term, and numerous authorities were cited in support of this proposition. (*United States v. Buchanan*, 8 Howard, 83; *Power v. United States*, 18 C. Cls. R., 275; *McClure v. United States*, 19 C. Cls. R., 179, 180;

*Dennis v. United States*, 20 C. Cls. R., 119; *Brannen v. United States*, 20 C. Cls. R., 212, 223; *United States v. Robeson*, 9 Peters, 319, 325; *United States v. Williams*, 5 McLean, 133.)

(4) More fundamental is the fact already alluded to, that the statement of facts does not state wherein the breach of contract by the United States consisted. The findings of fact of the circuit court are more explicit, and show that it was held to have arisen from the *modus vivendi* already referred to and compliance on the part of the Secretary of the Treasury with its terms. In order to render the Government liable to respond in damages for such alleged breach of contract the court must hold that the Government is liable in damages for its promulgation and enforcement of a treaty designed to settle international controversies and to regulate and preserve the seal fisheries of the United States, because a contract which the Government as *fiscus* may have negotiated may incidentally have been partially broken.

It is unnecessary to urge that this is a serious question and a different conclusion may be arrived at from that which Judge Wallace reached. (Transcript of Record, pp. 32-33.) (Compare *Deming's Case*, 1 C. Cls. R., 190; *Jones & Brown's Case*, 1 C. Cls. R., 383; *Wilson v. United States*, 11 C. Cls. R., 513; *Stone v. Mississippi*, 101 U. S., 814; *Menken v. City of Atlanta*, 2 South-eastern Rep., 559, 564; *Dunham v. Lamphew*, 3 Gray, 260; *Smith v. Maryland*, 18 How., 71; *Gibson v. United States*, 166 U. S., 269.) Yet if the Government is not liable to respond in damages in such a case as this, the question of the manner and mode of presenting the

defendant's claim to the accounting officers under Revised Statutes, 951, becomes wholly immaterial.

(5) Nor is it easy to see how the question of the amount of rentals and other sums due to the Government under the lease can be separated from the question of the amount of defendant's damages for the alleged breach of contract by the United States, even to the extent of extinguishing the former sum by setting it off against the latter. Judge Wallace, in the circuit court, in determining the amount due to defendant for breach of contract by the Government, sought to ascertain the amount of profits which defendant would have made on the 12,500 additional seals it would have taken. (Transcript of Record, p. 45.) He ascertained the amount by deducting from the average estimated market price of such 12,500 seals the amount which defendant would have been obliged to pay to the Government on account of them, *on the Government's construction of the lease*, which he adopted. Thus he considered the two questions, the so-called main question and the question of the counterclaim, inseparable.

(6) Attention may also be directed to the erroneous impression that may be derived from the assumption in the question certified in the language—

When such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff.

This suggests that in fact no affirmative judgment is asked against the United States. If the demand of an affirmative judgment be deemed a material circumstance,

reference to the transcript of the Record shows that an affirmative judgment was demanded by defendant (p. 19). This claim in favor of defendant is expressly described as a counterclaim, not merely as a set-off, and the prayer for judgment in the answer is "judgment dismissing said complaint with costs, and for said sum of \$283,725, with interest thereon from the 1st day of June, 1894, and costs." It is true, however, that defendant's counsel, on the trial and in the circuit court of appeals, admitted that it could not enter an affirmative judgment against the United States in this action.

In preparing the "statement of facts," the circuit court of appeals no doubt eliminated many of these questions with a view to simplifying the question of law on which it requested instructions from this court. The result may, however, be that this court will answer the question certified in a certain way, and immediately afterwards, on writ of error to review the action of the circuit court of appeals after such instructions were rendered, will be bound to decide the question of the counterclaim differently, because of the additional facts omitted from the "statement of facts," which may make the question certified wholly immaterial. It appears to have been on this principle that this court required the whole record and cause to be sent up to it for consideration, in the case of *Northern Pacific Railroad Co. v. Walker* (148 U. S., 391), in which the cause was disposed of on other questions than those certified by the circuit court of appeals, and without passing on those questions.

(F.) *The importance of the public question involved to the executive branch of the Government.*

The large amount of revenue coming to the Government which is involved in this controversy, a large portion of which is concededly due, has already been referred to. But certainly not less important is the bearing the case has on the policy of the Government relative to the seal fisheries. The fact that the executive department has been engaged in negotiations with Great Britain and other countries looking to the adoption of further restrictive regulations of fur sealing in and about these Pribilof Islands is a matter of public knowledge, as also the fact that an international conference has been agreed upon. It is of great importance to the Government to have it determined whether in the interest of the seal-fishing industry it may adopt regulations designed to protect the seal fisheries, and limiting the catch, without being guilty of a breach of its contract with the North American Commercial Company. The circuit court has decided—and the question is not embraced in the statement of facts accompanying the certificate from the circuit court of appeals—that the United States is answerable in damages for breach of contract for entering into and enforcing such a convention with England, but that defendant must resort to another action to recover the money in default of compliance with Revised Statutes, 951. Closely connected with this is the question of policy, addressing itself to the executive branch of the Government as to what course the Government should take in the matter, in which the

pecuniary return which accrues to the Government under the existing lease is an element to be considered.

It is therefore respectfully submitted that the application should be granted.

A certified copy of the entire record of the case in the circuit court of appeals is filed as part of this application, in compliance with paragraph 2 of Rule 37, paragraphs 1 and 2 of which are as follows :

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it requires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish the court with a certified copy of the whole of said record.

The statement of facts and question certified from the circuit court of appeals are already before this court, being case Docket No. 431.

Notice of this application has been given to counsel for plaintiff in error in the circuit court of appeals.

It is also submitted, for the reasons which appear above and in the letter of the Secretary of the Treasury printed in the Appendix, that the case should be advanced on the docket, and assigned for hearing at an early day convenient to the court.

J. K. RICHARDS,  
*Solicitor-General.*



## APPENDIX.

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United States circuit court of appeals, second circuit.

Present, Lacombe, circuit judge; Shipman, circuit judge; Townsend, district judge.

THE NORTH AMERICAN COMMERCIAL	}
Company, plaintiff in error,	
<i>v.</i>	
THE UNITED STATES, DEFENDANT IN	
error.	

CERTIFICATION OF QUESTIONS TO THE SUPREME COURT,  
UNDER ACT OF MARCH 3, 1891.

This case came before this court on May 10, 1897, upon a writ of error, sued out by defendant below, to review a judgment of the United States circuit court, southern district of New York, in favor of the plaintiff below, defendant in error. The judgment was entered June 13, 1896, for \$107,257.29, being for \$94,687.50, with interest and costs. The case was tried in the circuit court by the court without a jury, under sections 649 and 700 of the United States Revised Statutes, and findings of fact and conclusions of law duly made and filed. The plaintiff below, The United States, took no proceedings to review the judgment of the circuit court by writ of error or otherwise.

Argument being had upon the writ of error, certain questions of law developed, concerning which this court desires the instruction of the Supreme Court for its proper decision.

## STATEMENT OF FACTS.

The facts in the case, so far as they bear in any way upon the questions certified, are as follows:

The action is to recover rent for the year 1893 accruing under a lease executed March 12, 1890. By that lease the Secretary of the Treasury, in pursuance of statutes of the United States, leased to the North American Commercial Company (hereinafter styled the defendant), for a term of twenty years from May 1, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of said seals. By the same instrument defendant agreed to pay a certain gross sum as annual rental, and also certain other sums for each fur skin taken and shipped. After the making of said lease defendant entered upon the enjoyment of the right thereby granted; and certain disputes which arose between the parties touching the amounts to be paid by defendant for the years 1891 and 1892 were amicably adjusted between the parties.

The United States during the year 1893 prohibited and prevented defendant from taking any fur seals whatever on said islands, and thus deprived defendant of the benefit of its said lease; but during said year 1893 the United States itself, through agents of the Treasury Department, took upon the said islands 7,500 seals, and defendant was permitted to cooperate in selecting the seals so killed, and to take, and it did take and retain, the skins of those seals; and for the 7,500 skins so taken and retained defendant has not paid.

In consequence of the breach of its contract by the United States during the year 1893 defendant sustained a considerable loss, for which it makes a claim against the Government; and in this action, brought to recover

rent under the contract for the year 1893, it seeks to recoup or set off, to the extent of plaintiff's claim only, the damages it has sustained by reason of plaintiff's failure to carry out such contract during that same year according to its terms.

On November 27, 1895, N. L. Jeffries, attorney for the said defendant, wrote and caused to be sent to the Secretary of the Treasury a letter stating that the said defendant presented the same as its claim for damages against the United States in the sum of \$283,725, through the Secretary of the Treasury, to the proper accounting officers of the Department of the Treasury for examination and allowance; and that the said defendant was the lessee under its said lease, a copy of which was stated to be annexed to the said letter, and that by the terms thereof the United States had leased to the said defendant the exclusive right to engage in the business of taking fur seals on the said islands; and also stating the agreements on the part of the said defendant under the said lease, and that it might have taken 30,000 fur seals in the year 1893, and that it was prohibited by the United States from taking any fur seals on the said islands during that year; and that it had incurred large expenses and that it had faithfully performed its agreement, and that by reason of the United States having prohibited said defendant from taking any seals in that year said defendant had sustained a loss in the said sum of \$283,725; and also stating that that communication was respectfully submitted for the consideration of the accounting officers of the Treasury Department. On or about December 24, 1895, the Assistant Secretary of the Treasury wrote and caused to be sent to the said N. L. Jeffries, a letter addressed to him as attorney for the said defendant, in which he referred to the said letter of the said Jeffries to the Secretary of the Treasury, dated November 27, 1895, and stated that the claim made by that letter was thereby rejected.

The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States limiting the catch of seals upon the said islands to 7,500, and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident.

QUESTION CERTIFIED.

Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

"Is defendant entitled to set-off or recoup against plaintiff's claim to recover under the lease for the skins taken in the year 1893 whatever damages defendant sustained by reason of any breach of contract by plaintiff occurring during the same year when such recoupment or set-off is strictly limited to an amount not exceeding plaintiff's claim, as proved, and no affirmative judgment is asked in favor of defendant against the plaintiff?"

In accordance with the provisions of section 6 of the act of March 3, 1891, establishing courts of appeal, etc., the foregoing question of law is, by the circuit court of appeals for the second circuit, hereby certified to the Supreme Court.

E. HENRY LACOMBE, *Circuit Judge*.

N. SHIPMAN, *Circuit Judge*.

WM. K. TOWNSEND, *District Judge*.

JUNE , 1897.

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., October 28, 1897.*

The honorable the ATTORNEY GENERAL.

SIR: Inviting your attention to the cause of the United States against the North American Commercial Company, to recover the amount due the Government under the lease to that Company of the right to take fur seal skins on the Pribilof Islands, for the year 1893, in the United States Circuit Court for the Southern District of New York, in which cause judgment was rendered for the plaintiff in the amount of \$107,257.29, and an appeal taken by the defendant to the Circuit Court of Appeals for the Second Circuit, I have the honor to call your attention to the fact that no payments have been made on account of said lease since 1892. The amounts now due from the lessee, computed in accordance with the terms of the contract, including the judgment rendered as above stated, aggregate \$874,680.66, payment of which cannot be had until the questions at issue are finally adjudicated. Payment of the yearly rentals from the islands accruing from subsequent years will be suspended for the same reason. The covering of this large amount already due into the Treasury, and the receipt at the proper times of the subsequent annual rentals, as they become due, are cogent reasons which move me to desire a speedy determination of the controversy.

From the fact that no moneys have been received from the lease of the islands since 1892, several resolutions of Congress have been addressed from time to time to the Secretary of the Treasury, calling for a statement of the

moneys received on this account, and of the measures which have been taken to secure payment of the annual rentals by the lessee. In view of these resolutions, it is deemed wise to expedite as far as possible the determination of the questions which have arisen, upon which depends the settlement of the account between the Government and the North American Commercial Company.

In addition to the above suit involving the rental for 1893, other suits have been instituted in the same court to recover the rentals for the years 1894, 1895, and 1896, respectively, the amounts embraced in the latter suits being respectively \$214,298.37, \$204,375, and \$348,750.

In view of the facts herein set forth, I have the honor to request that application be made to the Supreme Court of the United States that the whole of the cause for the recovery of the rental for 1893, and if possible, the actions for the rentals for subsequent years, be removed to that Court for determination.

Respectfully yours,

L. J. GAGE, *Secretary.*





No. 431.

Motion Papers for P. E.

Office Supreme Court, U. S.  
FILED  
NOV 26 1897  
JAMES H. MCKENNEY,  
CLERK.

Filed <sup>IN DOE</sup> Nov. 15, 1897.  
Supreme Court of the United States.

OCTOBER TERM, 1897.

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No. 431.

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THE NORTH AMERICAN COMMERCIAL COMPANY,  
PLAINTIFF IN ERROR,

*against*

THE UNITED STATES, DEFENDANT IN ERROR.

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**Statement on Behalf of the Plaintiff in Error in Relation to the Application of the Defendant for an Order that the Whole Record be Sent to this Court.**

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The counsel for the plaintiff in error, while not agreeing to the accuracy in all respects of the statement made by the Solicitor General of the questions involved in this case, do not, however, deem it important, for the purposes of the present application, to make any corrected statement, inasmuch as they concede that the grounds and reasons stated by the learned Solicitor General in support of his application, on pages 17 to 19, inclusive, are amply sufficient.

Moreover, the plaintiff in error is itself desirous that a

final determination of the questions involved in the controversy should be determined at as early a period as practicable, to the end that its accounts with the Government may be settled and the balance found to be actually due immediately paid.

Should the Court grant the application, it is hoped that the case will not be set down for argument on any day prior to February 1st. Mr. Carter's engagements are such that it would be somewhat embarrassing to him to be required to argue it on an earlier day.

JAMES C. CARTER,  
*Of Counsel for Plaintiff in Error.*



IN THE  
Supreme Court of the United States,

ON CERTIFICATE AND CERTIORARI FROM THE  
SECOND CIRCUIT.

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THE NORTH AMERICAN COMMERCIAL  
COMPANY,

Plaintiffs in Error,

*vs.*

THE UNITED STATES.

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**Brief for the Appellant.\***

This case comes up on a certificate from, and writ of certiorari to, the United States Circuit Court of Appeals for the Second Circuit.

The action was brought by the United States upon what is called a *lease* of the right to take seals upon the Pribylof Islands, executed March 12th, 1890, by the Secretary of the Treasury, under the provisions of the laws relative to the fur seals in the territory of Alaska, to the defendant company, for rent to the amount of \$132,187.50, alleged to be due under the lease for the year ending April 1st, 1894.

These provisions of law were, at the time of the execution of the lease, contained in the Revised

Statutes; but they were taken almost bodily from an act of Congress, passed July 1st, 1870, entitled, "An Act to prevent the extermination of Fur Bearing Animals in Alaska." That act, along with provisions designed to protect the seals, contained others requiring the Secretary of the Treasury to lease the right of taking them for their skins, and prescribing the method, terms and conditions of the leasing. A lease had been made under these provisions to another company, the predecessor of the defendant, dated May 1st, 1870, for twenty years, and the lease to the defendant company was made to take effect upon the expiration of that term.

The provisions, in substance and effect, of the law of 1870, leaving out of view the details, were five:

*First.*—To make the killing of seals unlawful, except during certain months.

*Second.*—To protect the seals by prohibiting any killing of *females* by any persons, under any circumstances, or of any *male* seal less than one year old, or of any seal, except by permission of the government.

*Third.*—To *limit the number* of seals which might be taken without violating the foregoing prohibitions to 100,000; 75,000 on the Island of St. Paul, and 25,000 on St. George; thus establishing a *maximum* number of *male* seals which might be made the subject of capture for their skins.

*Fourth.*—To let out, every twenty years, the sole right to take this *maximum number* to the highest bidders for successive terms of twenty years, a minimum rental being prescribed of \$50,000 per annum, the rivalry consisting in the bidding of sums in excess of that.

*Fifth.*—Inasmuch as the successful bidder might, unless further restrictions were provided, take 100,000, and this might prove to be too large a draft upon the herd, it was further provided that the Secretary of the Treasury might, in his discretion, “restrict and “limit the right of killing, if it should become necessary for the preservation of such seals.” But this discretion could be exercised only “with such proportionate reduction of the rents as shall be right and “proper.”

It will be perceived that these provisions regarded the herd of seals on the Pribylof Islands as a proper subject of husbandry, just as much as a sheep or cattle ranch, the husbandry being founded on the well-ascertained truth that, whereas the number of births is equally divided between males and females, yet for purposes of reproduction one male may suffice for twenty or even fifty females. The scheme of nature is, itself, suited to this policy; for, in the case of seals, the older and stronger males will not permit the younger ones to come upon the breeding grounds, where the females are gathered together in harems of ten to forty or more under the vigilant supervision of their respective bulls. A large number of young males may, therefore, be taken annually without diminishing the size of the herd, for, unless taken by man, a similar number would perish in the deadly struggle for supremacy, and in other ways.

This policy was the fruit of very long experience under the Russian administration, and is the one adopted wherever the fur seal has been preserved by the care of man.

Under the first lease, therefore, according to the statute of 1870, the rights of the lessees and of the United States respectively were extremely simple and

clear. The "right," which was the thing which the Secretary of the Treasury was directed to lease, was the right to take the annual product of the herd, not exceeding 100,000, subject to such further limitations as to number as the secretary should from time to time make, whenever in his judgment it should become necessary "for the preservation of such seals," a proportionate reduction in the rental being made whenever this discretion should be exercised.

It should be observed that the restriction of the killing to 100,000 was, in terms, limited to twenty years from the passage of the act. This was obviously for the reason that the making of a twenty-year lease was the dominating motive of the whole act, and this limitation was for the very purpose of defining "the right" intended to be leased, and to supply the *maximum number* upon which the discretion of the secretary to *reduce* was to operate. He could not, of course, *further limit* the right to take with a *proportionate reduction* of rental, unless a *maximum* were established from which the amount of the reduction could be computed.

It was further provided in the Act of 1870 (Sec. 4) that "At the expiration of said term of twenty years, or on surrender or forfeiture of any lease, *other leases may be made in manner as aforesaid*, for other terms of twenty years." And, although the prior limitation to 100,000 annually would, by its terms, expire at the end of twenty years from the passage of the act, it was effectually retained by a clause of the 5th Section as follows:

"And if any person or company, under *any lease herein authorized*, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island *in this act prescribed*, such person or company shall in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of seals killed, &c."



When the Act of 1870 came to be dealt with in 1874 by the revisors all its provisions were re-enacted, with very slight changes in language, including the provision last above mentioned; and the conclusion cannot, as the plaintiffs in error contend, be avoided, that the same system of leasing was thereby continued in all respects.

Under the first lease, the maximum number, 100,000, had uniformly been taken, except in a single year, when the lessees, in consequence of the condition of the market, chose not to take that number.

When the right was again put up every one, of course, supposed that the maximum was the same, and subject to the same discretion in the secretary. Indeed, he assumed to exercise that discretion by the announcement at the time of bidding that the number to be taken the first year would be *limited* to 60,000. The amount bid by the defendant company as rental was a fixed sum of \$60,000, and the further sum of \$7.62½ for each seal taken, and this was the rental incorporated into the lease.

During the first three years of the lease the defendant company was limited to a very small catch, the first year in consequence of the poor condition of the herd, and the two succeeding years not by the exercise of the discretion of the secretary, but by the absolute order of the government in fulfilling its obligation, under what was called the *modus vivendi*, to stop the killing of seals on the islands in consideration of the stoppage by Great Britain of pelagic sealing.

Settlements were effected between the lessees and the Treasury Department by making corresponding deductions of rent on the assumption that the maximum *quota* of 100,000 was in force under the present lease.

For the year ending April, 1894, the company actually received only 7,500 skins. Whether it really *took* these under the lease is a question; but the Treasury

Department (under a new administration) insisted, not only that it took them under the lease, but that the revision of the act of 1870 had, in effect, abrogated the statutory maximum, 100,000, and, with it the provision for a proportionate reduction of the rental, and consequently, that the company was obliged to pay the *whole amount of the rental without reduction*; and that the settlements for the prior years were invalid. The company insisted that by the provisions of its lease, just as in the case of that to its predecessor, there was a maximum limit prescribed of 100,000, and that, therefore, if the take had been reduced in accordance with the law, the rental should be correspondingly reduced, and would have been content to make a settlement based upon this view, which would have required it to pay the sum of \$23,789.50. But it also insisted that the reduction was a violent one, in breach of the contract, and a just foundation for a large claim for damages, which claim it had in due form presented. The parties being thus in difference, this action was brought.

The defence set up in the answer and at the trial was three fold :

*First.*—That the government having violently, and without any exercise of the discretion of the secretary, prohibited its lessees from taking any seals, had itself failed to perform its part of the contract for the year 1893-1884 and could not maintain an action upon it for the rent of that year.

*Second.*—If it should be considered that the defendant company in receiving the 7,500 seals had accepted the benefit of a partial performance so as to allow a suit by the government, the claim of the government could yet not be treated in a more favorable way than if it had rightfully limited the catch to 7,500 seals, and therefore that the rental must be correspondingly reduced.

*Third.*—That the company had, in any view, a just counterclaim for the breach by the government of its contract in not permitting it to take the whole product of the herd up to the maximum number, which counterclaim far exceeded, as it insisted, the claim of the government.

This defence was met by the government by an attempt to set up a new interpretation of the law under which the lease was made. This was that the designation of 100,000 (75,000 on St. Paul and 25,000 on St. George) seals as the normal and maximum number of seals which might be taken under leases was for the period of *twenty years only*, and was, therefore, applicable only to the *first* lease; that with the expiration of that limitation the provision for a further limitation of the killing by an exercise of the discretion of the secretary in case the preservation of the seals required it, accompanied by a proportionate reduction of rental, also failed, and the secretary was consequently left with unlimited authority to make any lease which he deemed best for the interest of the United States, and could limit at any time, in his absolute discretion, the number of seals to be taken; and that, however small this number, the lessees were bound to pay the whole rental stipulated for in the lease; and that the defendant company having actually received 7,500 skins in the years 1893-4, were bound to pay the whole rental therefor; that if this result did not flow from a true interpretation of the act of 1870, as incorporated into the Revised Statutes, it did flow from the provisions of an amending act passed in 1874, which, although passed before the revision was adopted, did yet, because passed after December 1st, 1873, as of which date the revision was to take effect, amend the act as revised. This law of 1874 simply *authorized* the secretary to designate the number of seals to be killed on the islands of St. Paul and St.

George. There can hardly be a doubt that it was simply designed to enable the secretary to make a new apportionment of the aggregate of 100,000 between St. Paul and St. George, and to make a corresponding alteration in the first lease, which was then in force, for the reason that it had been found that while more than 75,000 might safely be taken from St. Paul, 25,000 was too large a number from St. George. It was a change equally desired by the department and the then lessees, as is evidenced by the fact that the change in the lease was made immediately on the passage of the act. Until the present controversy no one had ever thought of imputing any other effect to it.

The government further contended that even if the rental were subject to reduction, the gross sum of \$60,000 only should be deemed *rental* for such purpose, and the \$7.62½ per each seal be viewed as a *bonus* and not subject to reduction.

It contended also in relation to the counterclaim that there was no foundation for that, for the reason that by the contract the lessees were entitled to take only such number as the secretary chose to allow them, and that the 7,500 should be deemed to be the number so allowed, which number they had received. It also contended that the proofs were not sufficient to establish the counterclaim, and that if they were it was a claim in the nature of set-off, and had not been so presented to the accounting officers as to be allowable as a set-off under the statute.

The case was tried in the Circuit Court without a jury under sections 649 and 700 of the Revised Statutes, and findings of fact and conclusions were duly made and filed. The learned Judge, at the trial, as appears by his opinion and findings, took, upon the point of the interpretation of the lease, substantially the view of the government that the designation of the maximum of 100,000 was only for

twenty years, and that by the *Revised Statutes* this designation was abrogated for future leases, and, if the Revised Statutes did not have this effect, the amending act of 1874 did; and, consequently, when the new lease was made it was left to the secretary to determine what number should be taken; and that the provision for a reduction of the number with a corresponding reduction of rents became inoperative. Nevertheless, he was of the opinion that, in case the secretary made no designation of the number, the old designation would stand, and that the lessees would have the right to take the whole annual product, whatever that might be established to be, not exceeding 100,000.

He further held that the prohibition under the *modus vivendi* was not a designation by the secretary, but a violent prohibition by the government; and, consequently, that if the lessees had not received any skins the action could not have been maintained. But he held that, although the seals actually taken were not really *taken* by the lessees, they were received under the contract, and the lessees must accordingly make equitable compensation for them; and that a proper way to determine this was to ascertain what the fair product of the year which might safely be taken was, and compute what each skin would have cost them, assuming they had taken that number, and by this mode of computation, finding that 20,000 might properly have been taken, he reached the sum of \$94,687.50 as the amount due to the government.

He held in respect to the counterclaim that the government had clearly broken its contract by its violent prohibition, and that the lessees were entitled to damages, and, upon the finding that the number of 20,000 might have been taken and the proved value of the skins, he computed the damages at \$142,087.50.

He found, however, that the claim for damages had not been presented to the proper accounting officers as required by law, and, therefore, that the defendant could not use these damages to reduce the amount of the claim of the government.

The effect of this decision, so far as the *counter claim* is concerned, would not be felt hereafter, inasmuch as the *modus vivendi* is no longer in operation, but, upon the question of the interpretation of the lease it would be most oppressive upon the lessees inasmuch as it would be felt in every year during the continuance of the lease. The bids were made upon the assumption of a maximum catch of 100,000, with a proportionate reduction of rental in case of an exercise of the discretion of the secretary to limit it below that number. The sad fate of the seals has made it certain that during the whole of the sixteen remaining years of the lease, but a small fraction of the 100,000 will be allowed to be taken. The expense of taking 10,000 is substantially the same as that of taking 100,000, and for each seal the lessees must pay the government the same fixed price, whatever number is taken, and a larger proportion, for each seal, of the gross rental of \$60,000, as the number is smaller. If the decline in the value of skins goes on as it has begun, it will be impossible for the lessees to escape a heavy loss each year. If limited to 10,000, as may soon be the case, each seal would cost \$6 for gross rental plus \$7.62½, plus \$2 for tax, plus 50c. for pay to natives, making \$16.12½, besides a large additional sum not less, probably, than \$6 for the share of each seal in the large expenditure necessary to furnish a steamer, market the seals, pay freight, insurance and commissions, and satisfy the other obligations assumed by the lessees in the lease.

Meanwhile the government runs no risk and would receive for a catch of 10,000 \$156,250.

After the decision by the Circuit Court the case was

taken by writ of error to the United States Circuit Court of Appeals. The formal assignment of errors will be found at page 172 of the record.

The case was argued before the Court last mentioned, but, before any decision, that Court, under the act of March 3d, 1891, certified to this Court a certain question which appears at page 189 of the record.

Thereupon this Court issued to the Court below a writ of *certiorari*, in pursuance of which the whole record and proceedings were sent to this Court.

#### SPECIFICATION OF THE ERRORS RELIED UPON.

*First.*—On error in the interpretation of the lease adopted by the learned Judge at the trial, to the effect that, under the Revised Statutes, the provisions of the act of 1870, fixing a maximum number of seals which might be taken, with a discretionary power in the Secretary of the Treasury to reduce it in case of necessity for the preservation of the seals, and providing for a reduction of the rental in case of an exercise of such discretionary power, were not applicable to leases made after the lapse of twenty years from the passage of the act of 1870.

*Second.*—On error in the decision of the Circuit Judge that the act of March 24th, 1874, substituted, in respect to future leases, in place of the pre-existing law fixing a maximum take, subject to further restriction by the Secretary of the Treasury, and requiring a proportionate reduction of rental in case of the exercise of such power of further restriction, a full discretionary authority in the secretary to determine the number of seals to be taken, without giving, in any case, to the lessees, any right to a reduction of rental.

*Third.*—On error in the refusal or failure of the Circuit Judge to decide that the right acquired by the



lessees under the lease was the right to the annual product of the seal herd on the islands of St. George and St. Paul not exceeding 100,000, and subject to the laws of the United States relative to the taking of seals from the said islands, and to the discretion of the Secretary of the Treasury to reduce the maximum number of 100,000, should a reduction be necessary for the preservation of the seals, and with a right to a proportionate reduction of the rent to be paid in case of such reduction of the maximum number.

*Fourth.*—On error in the decision of the Circuit Judge that the action could be maintained notwithstanding the breach by the United States of its obligation to permit the lessees to take from said islands the annual product of the seal herds thereon.

*Fifth.*—On error in the decision of said Circuit Judge that the United States had made a partial performance of its part of the contract contained in the lease, and that such partial performance had been accepted by the lessees.

*Sixth.*—On error in the decision of said Circuit Judge that the defendants, the lessees, had not presented to the proper accounting officers, pursuant to law, their claims for damages for the breach by the United States of its obligation mentioned in the fourth above specification.

*Seventh.*—On error in the decision by said Circuit Judge that the said claim of the defendants for damages could not be asserted by way of defence, in whole or in part, to the action, without presentation to the accounting officers as aforesaid.

**First Point.**—It is important in the interpretation of the lease upon which the action was brought to ascertain what the *thing leased* really was. It purports to be, not a mere license to hunt or fish, but the transfer for a term of years of a valuable *right* possessed by the United States in the nature of *property*, and we should first inquire what this valuable right was.

It will be found to be *the right to take the annual product* of the seal herd on the Pribylof Islands, which annual product was the fruit of the industry, labor, expense and care bestowed by the United States upon that herd, and which could be gathered only on those islands.

1. The peculiar nature and habits of the animal, differing widely from that of ordinary wild animals, made a system of *husbandry* possible, by which a large annual draft might be made without diminishing the normal numbers of the herd. The following are some of the particulars in the nature and habits of the animal which gave it this capability.

- a. Its invariable place of resort for six months of the year, obedient to the imperious instinct of reproduction, was these islands.
- b. The herd produces annually a presumably equal number of males and females; but, the animal being highly polygamous in its nature, the breeding part of the herd divides itself into harems, absolutely exclusive and separate from each other, consisting of from fifteen to fifty females to one male. There is, consequently, a need, in order to maintain the numbers of the herd, of but a com-

paratively small number of all the males produced. Only those males maintained a place on the breeding grounds who were able to do it by their age, strength and prowess, and few attempted this under the age of five years. All the males under this age, hauled up upon places separate and apart from the breeding grounds. The skins best fitted for the purposes of commerce were those of males from two to four years of age. These could easily be separated from those less valuable as being too young or too old, and killed, away from the breeding grounds, in such a manner as not to disturb the process of breeding. This superfluity is the *annual product* of the herd which may be taken without injury to the stock. The superfluity of males thus taken would, otherwise, have been destroyed in the deadly battles waged between the males. Nowhere in nature can be found a more perfect provision by which man can obtain the benefit of a bounty of Providence if he will only comply with the conditions upon which it is offered.

- c. The whole herd in hauling upon the islands voluntarily submitted itself to the power of man. Their means of locomotion were extremely imperfect and man could easily kill them all.
- d. We have said that the nature and habits of the animals made them *susceptible of being treated as property*. All that was necessary to make them property was to so *treat* them.
- e. Treating them as property consists in tak-

ing possession of, and caring for, them *as* property; that is to say, guarding and cherishing them so as to enable them to carry on successfully the process of reproduction; never to take any part of the *breeding stock*, but to take all the superfluous *annual product* so far as the commercial demand called for it.

*f.* To this end the care, industry and self-restraint of the United States, the owners of the land, were requisite, and in the following particulars:

- (1.) To establish a marine guard around the islands to keep off intruders.
- (2.) To reserve from all other purposes all parts of the islands upon which the seals were accustomed to haul up and devote these parts to the natural desires and instincts of the seals, thus inviting them to peacefully land.
- (3.) To exercise self-restraint, and not kill any breeding animals at any time.
- (4.) To maintain a system of watchfulness on the islands, and allow no intrusion upon the process of breeding either by alarming noise, dogs or other intruders.
- (5.) To separate the annual product of the young males and kill them in such a manner as not to disturb breeding operations.

*g.* All these things the Russians had done for

half a century prior to the acquisition by the United States, and the United States, by the passage of the act of 1870, determined to do, and ever afterwards have done, the same things.

- h. Any other treatment of this animal would amount to simple destruction, and would be an unjustifiable destruction of one of the bounties of Providence intended for the perpetual benefit of man, and, therefore, a crime against natural law.
2. These considerations conclusively establish the above point, namely, that there was an *annual product* of the herd, which might safely be taken, and which ought to be taken, if the demands of commerce called for it, and that this was the property of the United States. They are fully admitted in the opinion of the Court and established by the findings and evidence (Record, pp. 23, 37 to 39).

**Second Point.**—This right to take this *annual product*, being what the United States possessed, was the right intended by law to be leased by the United States to private individuals, and is, therefore, the right described in Sec. 4 of the Act of 1870, as

“ The right to engage in the business of taking  
 “ fur seals on the Islands of St. Paul and St.  
 “ George ”; and was the same right as that  
 described in Sec. 1963 of the R. S. as “ the

“right of taking fur seals on the islands herein  
“named.”

**Third Point.**—While, however, it is clear that there was an annual product, it would not be safe to leave it to the judgment of a lessee to determine what its amount was. He might take too many, or not properly take, and thus endanger the maintenance of the herd at its normal number; and hence arose the necessity, when the scheme of leasing was adopted in 1870, of defining what the annual product should be. The motive of self-interest in the lessees themselves would undoubtedly be some guaranty that it would not be exceeded. This, however, might not prove sufficient, and certainly would not for the few years immediately preceding the expiration of a lease. Additional security upon this point was, therefore, requisite. This was fully provided by the Act of 1870.

1. It was effected mainly by the provisions of the first two sections. These prohibited the killing of any female seal under any circumstances. No such killing could take place without immediately touching the birth-rate and thus diminishing the stock. They further prohibited the killing of more than 100,000 males in any one year. The Russian experience was supposed to prove that this number could be safely taken. The actual experience of the United States has proved the same, for, during a period of twenty years, 100,000 had been safely taken without affecting the normal numbers of the herd, until after

the effect of the enormous and criminal slaughter of females on the sea began to make itself manifest.

2. This, however, was not a fully sufficient guaranty. The estimate of 100,000 might prove to be erroneous. Disease or other casualties might so affect the herd as to make that number an excessive draft. It was therefore provided that the Secretary of the Treasury might exercise a discretion, in one contingency only, namely, in case it should "become necessary for the preservation of such seals," to further limit the number. Such limitation, however, could not, as it ought not, be made by him, without at the same time making a *proportionate reduction of the rents* reserved in any lease (Act of 1870, Secs. 2 & 3; 16 Stat. at Large, 180).

The annual product, therefore, which might be taken was thus clearly fixed by law at 100,000 males, unless that number were reduced by an exercise of the discretion of the secretary, and then, at the reduced number. No limitation was, in terms, made to *young males*, and none was needed; the breeding bulls could not possibly be taken; their ferocious character prevented interference with them.

3. There is no controversy between the parties respecting the above matters; but it is fully agreed that the lease *first* executed pursuant to the provisions of the Act of 1870, should be interpreted as follows:

- 1st. As giving the right to take the annual product of young males, not exceeding, however, 75,000 on St. Paul and 25,000 on St George.



2d. That this number might be further limited by an exercise of the discretion of the Secretary of the Treasury in one contingency, namely, if it should "become necessary for the preservation of such seals."

3d. That any such limitation must be accompanied "with such proportionate reduction of the rents reserved to the Government as shall be right and proper."

**Fourth Point.**—The contention of the appellant is that "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul in the Territory of Alaska" demised by the *second* lease, was precisely the same right as that thus limited and defined by law and demised by the first lease. The contention of the Government, on the other hand; at least as originally shaped, conceded that if the Act of 1870 had stood unrevised at the time the second lease was executed, such second lease would have been subject to the same interpretation as the first; but insisted that the revision in 1874 made a *new and entirely different definition* and limitation of the right to take fur seals, namely, that it should be the right to take *so many as, and no more than, the secretary should, by an exercise of his discretion, made at any time, designate*; and that the whole rental reserved in the lease should be payable in all cases, no matter what the designation might be. There is neither in the nature of the case, nor in the language of Congress in any of its legislation, nor in the acts of the parties, any support for this contention of the Government.

1. Upon this contention of the Government the lease would be deprived of its most obvious and conspicuous feature—that of a *contract*, in which something is assured to the lessees. Upon this view the lessees would acquire no legal right to a single seal. The Secretary of the Treasury would have an unlimited and unreviewable discretion to designate whatever number he pleased. Is it reasonable to suppose that Congress would require an annual rental of not less than \$50,000, and the performance of other burdensome and expensive conditions by the lessees, unless it designed to give them the whole annual product of the herd which might safely be taken?

2. In entering upon the interpretation of the provisions of the Revised Statutes it is of importance to know in what precise form the rule should be stated concerning the use which may be made, in construing revisions of laws, of the original acts which are the subject of revision. In fact, no intelligent judge or lawyer ever undertakes to interpret a revision without looking to the original law. Such resort was had in the present case in the Court below, both by the counsel for the Government and by the learned judge.

In the case referred to by the learned judge for a statement of the rule (*U. S. vs. Bowen*, 120 U. S., 508, 513), it is thus laid down by Mr. Justice MILLER. "When the meaning is plain, the Courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."

This rule is abundantly sufficient for the

present purpose. Surely no such interpretation as that for which the Government contends can be said to be clear, plain, or free from doubt on the face of the revision itself.

- a. What the Government claims is that the *nature of the right leased*, was changed in the revision so as to limit it to the number which the secretary should from time to time *designate*. But no *power of designation* is given to him by the revision any more than by the original act.
- b. The contention of the Government is that in respect to *future* leases, after the expiration of the first lease, no *maximum number* was prescribed by the revision. But the revision declares in express terms that a maximum number *is* prescribed. It takes from the original act the same language there used for the same purpose. "If any person "or company *under any lease herein authorized* (and future leases were all that "were authorized by it) knowingly kills or "permits to be killed any number of seals "exceeding the number in for each island "*in this chapter prescribed*" (Sec. 1968). There *was* a provision in the chapter prescribing the limit of 75,000 for St. Paul and 25,000 for St. George (Sec. 1962). It is to no purpose to say that it was prescribed only for twenty years. It was still *prescribed*.
3. But the rules respecting the interpretation of statutory revisions is ordinarily expressed somewhat differently.

There are a multitude of decisions holding

that in such cases there is a presumption that the Legislature did not intend to change, and, therefore, did not change, the original law unless an intention to change it clearly appears.

*Taylor vs. DeLancey*, 2 Caine's Cases in Error, 143.

*Case of John V. N. Yates*. 4 Johnson, 316.

*Goodell vs. Jackson*, 20 Johnson, 693.

*In the Matter of Brown*, 21 Wendell, 316.

*Douglass vs. Howland*, 24 Wendell, 35.

*Theriat vs. Hart*, 2 Hill, 380.

*Croswell vs. Crane*, 7 Barbour, 191.

*Elwood vs. Klock*, 13 Barbour, 50.

*Dominick vs. Michael*, 4 Sandford, 374.

*Taggard vs. Roosevelt*, 8 Howard Pr., 141.

*Jenkins vs. Fahey*, 73 N. Y., 355.

*The Schooner "L. W. Eaton"*, 9 Benedict, 289.

*The Bark "Brother"*, 10 Benedict, 400.

*Canaan vs. Pound Mfg. Co.*, 23 Bl., 173.

*Blake vs. National Banks*, 23 Wall., 307.

*Meyers vs. Car Co.*, 102 U. S., 1.

*Endlich on Statutory Interpretation*, Sec. 378.

4. If the rule as laid down in these cases is applied, there is an end of the argument at once, and the lease is to be interpreted just as if it had been made under the original Act of 1870.
5. But let us throw away the benefit of all presumptions and treat the question as if it were one to be determined upon an inspection of both

the original act and the revised statutes with no rules to guide us except what common sense, enlightened by legal study, as it is supposed to be with lawyers, suggests. It then becomes this: Did Congress intend to make the change asserted on behalf of the Government? The answer must be in the negative, and from the combined force of many different considerations.

- a. The purpose of revision is not *change*, but *preservation*.
- b. No *occasion* for a change is suggested. What had occurred in the short period of three years which had elapsed, at the time of the revision, since the making of the first lease to suggest the wisdom of a change? 100,000 had been taken each year without the slightest injury to the herd.
- c. By the original act Congress chose to exercise *its* discretion in fixing an absolute maximum limit, leaving the secretary to exercise a subordinate discretion in a single emergency which Congress could not foresee; namely, the case where the maximum catch might endanger the herd. Why should it change all this and commit to the secretary the unlimited discretion to permit 5,000 or 500,000, or none at all, to be taken?
- d. How, with such a change, could any intelligent bidding be had?

e. The change suggested wholly destroys the *right* purported to be leased of its character as a *right*. What right would the lessees have to take a single seal? And yet for this empty and precarious hope the law required the sum of at least \$50,000, in money to be paid, and, besides that, a great number of other things to be furnished and supplied which would cost, probably, twice as much!

The learned Judge felt the force of this consideration, but seemed to think it was met by the suggestion that government contractors often rely upon the good faith and honesty of some designated public officer, and referred to cases where the certificate of a government engineer is accepted as fixing the amount of work done and analogous cases. Undoubtedly, there is a practice in cases of large contracts with public corporations where the prices to be paid for work are all specified, but the quantities are unknown, to make the certificate of the government engineer conclusive as to quantities, in order to avoid litigation. But are there any cases where an officer of a government, or of a municipal body, is permitted to determine not only the quantity, but also the price, and this in his absolute discretion, without measurements or reference to any means of knowledge? Such a case would furnish some analogies to what the government asserts the present contract to be.

f. And why was not the limited discretion reposed in the secretary by the original act wholly sufficient? What object was there in giving him any discretion at all, except to

save the seals from ruinous drafts? And whenever this danger should arise, his discretion was unlimited.

- g. What was the *right* purported to be leased, and how was it created? It was right to take the annual product limited by *law* to 100,000, and subject to a further limitation by the secretary in a clearly specified emergency. This *right* was created by statutory provisions, protecting the seals, and thus securing an annual product and *defining the number* which that annual product should be taken to be. It was the *right thus created* which the Act of 1870 described and leased under the words, "the right to engage in " the business of taking fur seals on the " islands of St. Paul and St. George " (Sec. 4.) Section 5 of the same act provided for subsequent leases as follows: "That " at the expiration of said term of twenty " years, or on surrender or forfeiture of any " lease, other leases may be made in manner as " aforesaid, of other terms of twenty years." Other leases of what? Of the *same right*, of course, as was first leased, the right created by the same statutory provisions. Those provisions created a *thing* which could be leased. That *thing* was the right to take 100,000, subject to the secretary's discretion to reduce in a single emergency.

Now, the similar provision in the Revised Statutes for future leases purports in terms to authorize the future leasing of "the right of taking seals on the islands herein named" (Sec. 1963). What is that right? It must be something. There is absolutely no new provision in the R. S. re-



defining it, no new or additional discretion given to the secretary, but every provision of the old act *which created the right* is substantially re-enacted. How is it possible to prevent the inference that *the right* which is to be the subject of future leases is the *same* right which was the subject of the first?

- g. The argument on behalf of the government asserts that under the Revised Statutes the prescribing of the number to be taken was changed from a limitation by law to an entrusting of it to the perpetual discretion of the secretary; what language is there in the R. S. to justify this? The *powers* of the secretary given by the Revised Statutes are the *same* powers, and no others, and stated in the same language as in the original act. What language is there in the Revised Statutes conferring powers on the secretary which is not found in the original act?

The District Attorney urged in the Court below that Section 1963 of the R. S. under which future leases were provided for and the present one made, "does not contain a word about power to abate rent, or about a maximum quota, or about the annual increase of the herd." Neither does Section 5 of the Act of 1870, which contains the provision in that act for future leases.

- h. And, finally, and as we submit conclusively, the position of the Government violates the fundamental rule of construction that a *meaning must be given to all the language*, whether of a contract, a will or a statute. The

Government treats the *whole* of Sec. 1968 as absolutely without meaning.

6. But there is a short way of meeting this original contention of the government. That whole contention really rests upon the circumstance that the limitation of the killing to 100,000 (75,000 on St. Paul and 25,000 on St. George) was, by the Revised Statutes, limited to the period of twenty years from the 1st of July, 1870. But for this limitation no one would think of asserting any distinction between the right to be demised by the first, and that to be demised by the second lease.

Now that limitation is prescribed as absolutely by the act of 1870, as by the Revised Statutes; and whoever asserts that a second lease executed, with the Revised Statutes in force, would not confer the same right as that bestowed by the first lease, must also assert that a second lease, if executed, of the same character as, the first, under the act of 1870, would not confer that same right: in other words, that Congress in devising *the original scheme*, intended that there should be one particular kind of lease for twenty years, and, thereafter, a totally different one; that under the first lease the right was to be a *definite* one, the proper subject of a contract, and afterwards, and for no perceptible reason, a mere precarious *hope* resting in the discretion of the secretary; that in the one case the amount of rental should bear a proportion to what the lessees were permitted to enjoy, and, in the other case, no proportion whatever; and this in the face of language which declared in substance that the subsequent leases should be of the same character as the first.

This simplifies the discussion, and renders it quite unnecessary to take any notice of rules respecting the interpretation of statutory revisions.

**Fifth Point.**—By the act of 1870 *one scheme of leasing was established and made applicable alike to the first and every subsequent lease.* Every provision of this act was re-enacted by the Revised Statutes, and no new ones were added. It is equally clear that the two pieces of legislation were intended to be, and in fact are, the same; and the present lease is consequently of the same right, with all its incidents, as that of the first lease.

1. The provision creating the maximum quota of 100,000 and conferring upon the secretary the power to reduce it in a single contingency, and requiring, in such case, a reduction of the rental, was created under the original act by the third section of the act. That *same provision* is re-enacted as Sec. 1962 of the R. S.
2. The original act embraced, as was necessary, authority for the making of the *first* lease; (Sec. 4), and, in giving this authority, it described the character of the lease to be made, namely, by declaring that the secretary should lease “for the rental mentioned in section six  
“ of this act (\$50,000), to proper and respon-  
“ sible parties, to the best advantage of the  
“ United States, having due regard to the  
“ interests of the government, the native in-  
“ habitants, the parties heretofore engaged in

“ the trade, and the protection of the seal  
 “ fisheries for a term of twenty years from the  
 “ first day of May, 1870, the right to engage  
 “ in the business of taking fur seals on the  
 “ islands of St. Paul and St. George, and  
 “ to send a vessel or vessels to said islands  
 “ for the skins of such seals, at an annual  
 “ rental of not less than fifty thousand dol-  
 “ lars to be reserved in such lease.” Section  
 5 contained the provision for further leases;  
 but, as the character of the contemplated leases  
 had already been declared in the authority  
 given for the first lease, it was necessary  
 only to refer to the description, and it  
 was as follows: “That at the expiration of  
 “ said term of twenty years, or on surrender or  
 “ forfeiture of any lease, other leases may be  
 “ made *in manner as aforesaid* for other terms  
 “ of twenty years,” thus clearly making future  
 leases to be of the same character as the first.

When the revision came to be made in 1873  
 the first lease had been executed and was run-  
 ning. That part of the original act, therefore,  
 which made provision for the *first* lease was  
*functus officio*, and was dropped; but, in  
 dropping it, the description of the character  
 of the intended lease was dropped also. The  
 provision, however, for *future* leases was still  
 necessary and was retained; but this provision,  
 as it stood in the original act, declared that the  
 succeeding leases should be “in manner *as*  
*aforesaid*.” This language was no longer  
 effective, for there was no longer anything *as*  
*aforesaid*. Consequently, the revisors made the  
 provision for succeeding leases the subject of a  
 separate section, and, instead of saying that  
 they should be “in manner *as aforesaid*,”  
 which would have been insensible, they *ex-*  
*pressly declared* what their character should be,

and for this purpose used the *same language* as that employed in the original act to describe the *first* lease. The separate section was as follows:

Sec. 1963. "When the lease heretofore  
 "made by the Secretary of the Treasury  
 "to 'The Alaska Commercial Company,' of  
 "the right to engage in taking fur seals on the  
 "islands of Saint Paul and Saint George, pur-  
 "suant to the act of July 1, 1870, chapter 189,  
 "or when any future similar lease expires, or is  
 "surrendered, forfeited, or terminated, the sec-  
 "retary shall lease to proper and responsible  
 "parties, for the best advantage of the United  
 "States, having due regard to the interests of  
 "the Government, the native inhabitants, their  
 "comfort, maintainance, and education, as well  
 "as to the interests of the parties heretofore  
 "engaged in trade and the protection of the  
 "fisheries, the right of taking fur seals on the  
 "islands herein named, and of sending a vessel  
 "or vessels to the islands for the skins of such  
 "seal, for the term of twenty years, at an  
 "annual rental of not less than fifty thousand  
 "dollars, to be reserved in such lease."

If under the original act Congress required, as it undoubtedly did, that future leases should be of the same character as the first, by fully describing the character of the first, and then declaring that future leases should be "in manner as aforesaid," referring to the description, most certainly it did the same thing by the revision when it copied and repeated the same description in order to indicate the character of future leases.

3. The contention of the government involves the assertion that by the R. S. the following

*momentous changes* were effected in the scheme of future leases: (1) That the lessees in place of having a fixed right to the annual product of the herd, not exceeding 100,000, subject only to a discretionary power in the secretary to reduce the number in a single contingency, were to have no fixed right to a single seal; but a mere precarious right to such number as the secretary might designate, and with power in him to change any designation at any time. (2) That for this precarious right the same minimum rental was to be exacted as in case of the former fixed and definite right. (3) That the *whole* rental actually bid and incorporated into the lease was to be exacted, no matter how small a number of seals the secretary might allow to be taken.

And it involves the further assertion that these extraordinary changes were determined upon seventeen years before they could be put into operation, and for no conceivable reason! It would be a moderate requirement to say that before these assertions could be accepted they must be made good by pointing out in the revision language most clearly importing such changes.

There is absolutely no language importing any change whatever. The Revised Statutes reject the interpretation as clearly as the original Act. \*

- a. Where is there any language in the revision conferring this new and extraordinary power on the secretary? No word importing such authority can be found. The learned District Attorney, when pressed with this question in the Court below, gave the following apparently formidable exhibition of language

in the R. S. as conferring this power. He said that there was language authorizing the secretary to lease

- (1) "To proper and responsible parties."
- (2) "To the best advantage of the United States."
- (3) "Having due regard to the interests of the government."
- (4) "As well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries."

But this is not *new* language. It is precisely the same as that contained in Sections 4 and 5 of the original act.

- b.* But while the limitation of the number to be taken was, in the first instance, in the original act, confined to the period of twenty years from the passage of the act, it was, as far as future leases were concerned, continued and made applicable to them in explicit language, and the *same* language was re-enacted in the revision, as follows: "And if any person or company, *under any lease herein authorized*, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit," &c. (Sec. 5 of Act of 1870. Sec. 1968 of R. S.)

The only answer which was or can be made to the argument based on the foregoing provision was that after the expiration of twenty years



there would be "*no* number in this act prescribed," and the provision would become inoperative. But this is not correct. The number is none the less *prescribed*, because it is prescribed for the period of twenty years only. The argument for the government makes it necessary that we should *read into*, not only the Revised Statutes, but also the Act of 1870, between the words "shall knowingly," the words "during the period of twenty years mentioned in Sec. 3 of this Act;" or, in the case of the Revised Statutes, "during the period of twenty years from July 1st, 1870."

3. This contention of the government, involving, as it does, the assertion that even under the Act of 1870 the maximum quota of 100,000 would not stand in respect of future leases, encounters a series of objections either one of which would be sufficient to cause its refutation.

a. It assumes that Congress, in establishing for the first time a system of making the herd of Alaska seals most available for the benefit of the country and of commerce, was of the opinion, from the information it then possessed, that it was most expedient for the government and fair to the proposed lessees that *Congress itself* should impose a general limit upon the catch, with a power in the secretary to *reduce* the number if it should prove to be too large for the safety of the herd, and then, without the benefit of experience, *looked forward* to a period twenty years distant, and *predetermined* that experience would then have shown that its conclusion was wholly wrong, and that the best system would be for Congress to *abdicate*

its authority, and commit the whole business of leasing, and the amount of the catch, to the unlimited discretion of the secretary, so as to permit him to change the number at any time, regardless of the just expectations of the lessees when making their bids!

- b. This assumption requires that a totally new and different authority should be bestowed upon the secretary after the lapse of twenty years; and yet the act contains no word creating it.
- c. The interpretation is not only destitute of language in any way supporting it, but it does direct and immediate violence to the language contained in Section 5 of the original act, and repeated in Section 1968 of the revision, and made emphatic there by being the subject of an entire section.
- d. It accomplishes no just purpose, but can operate only to make the provision for bidding an occasion for wild speculation, resulting in disappointment of just expectations, and suspicions of scandalous collusion. Favorites may have the benefit of a hint concerning the action of the secretary, and honest bidders may be surprised by reductions in the permitted catch which they had no reason to anticipate. Indeed, the interpretation takes away from the transaction that character of *contract* which the legislation plainly impresses upon it.
- e. And all this when it is plain enough, upon the mere perusal, either of the original act, or of the revision, that the contemplation was

that future leases were to differ in no respect from the first one.

4. It will naturally be asked what the purpose of Congress was in confining the limitation of the fixed maximum to a period of twenty years. If there were no purpose clearly apparent the circumstance would furnish no ground for the extraordinary construction suggested by the Government. All that this would justify would be an interpretation of the statute according to its precise language; and this requires that we should say that, although the maximum is fixed by Sec. 1962, for the period of twenty years only, yet it is by Sec. 1968 perpetuated until Congress may choose to change it.

5. But this construction is so plainly in accordance with good sense and the nature of the business in hand, that we must suppose it to have been the one intended.

It will be observed (and it makes no difference whether we take the original act, or the revision) that the scheme of leasing was most carefully devised and designed to be *permanent*. *Successive* leases of twenty years were expressly provided for. There was one point only upon which present expectations might be disappointed. This was the *number* of seals which might be taken in each year. Congress had for its guidance the prior experience of Russia. It was true that the taking under Russian administration had never reached 100,000; but it had exceeded 70,000, and under it the herd had grown in numbers so that, from a period when in consequence of disease it had greatly dwindled, it seemed to embrace many millions. It was not unreasonable to suppose that a draft as

large as 100,000 could be taken without detriment. That number could, with the discretion reserved to the secretary, be fixed for the period at least of the *first* lease. When the time arrived for a new bidding the Secretary of the Treasury would naturally call the attention of Congress to the circumstance that the period of its limitation had expired, and that further legislation was in order. If it should then appear either that this number was too large, or that it might be safely made larger, the only amendment which would be needed would be one simply changing the number. But Congress might, for some reason, fail to act, or think no change necessary. In such case there would be difficulty, unless the existing maximum were in some manner preserved. All that was needed to obviate this difficulty was some provision continuing the maximum limit in case Congress *should not act*. This was admirably effected by the introduction of the clause found in Section 5 of the original act, and which was made into the distinct and separate Section 1968 of the revision. If Congress should act and change the limit, this clause would be applicable and effective to enforce the changed maximum. If Congress should not act, the clause would be effective to preserve the existing maximum. This necessary precaution could not have been taken in a better form.

**Sixth Point.**—The Act of March 24, 1874, changed no feature of the scheme as established by the then existing law.

1. A word or two of criticism upon the action of the Government in setting up this act as effecting a change in the system is justified. Most governments feel themselves bound by the common obligations of decency and good faith in dealing with those who contract with them. It is known nowhere better than in the Treasury Department that this act was passed in consequence of the discovery and communication to that department of the fact that, while the Island of St. Paul could well sustain, in 1874, a draft of more than 75,000, that of St. George was not well capable of a draft of 25,000; in other words, that the *distribution* of the 100,000 between the two islands effected by the Act of 1870, and continued by the revision, was not well contrived. It was equally desired by the then lessees and the department that a *re-distribution*, not changing the maximum of 100,000, should be made, and this act was passed in order to enable it to be done. The re-distribution was made and the lease modified accordingly *the next day* after the passage of the act. Never, until the present claim was made by the Government, has it been suggested that the act was passed for any other purpose, or with any other effect; but the claim is now made that it completely revolutionized the scheme of leasing, changed a definite right to a precarious hope, left no basis upon which intending lessees could intelligently bid, and put it in the power of the secretary to restrict, or stop, the catch at any

time, for any reason, and yet exact the whole of an enormous rental!

The main argument before the trial Court was oral, although printed briefs were afterwards submitted. It seemed to the appellant's counsel, upon that argument, that the purpose of the Act of 1874, as above stated, was practically agreed to by both sides, and that the learned District Attorney did not greatly rely upon this law, but referred to it rather perfunctorily, and as a matter which deserved some consideration. He was, therefore, somewhat surprised at the very important weight allowed to this act in the opinion of the learned Judge. Serious attention must, therefore, now be given to this law.

2. Let us first see in what precise shape the question presents itself. We must recur to the Act of 1870, purported to be amended, and see what the scheme of leasing established by that act was.

As already pointed out, the Act of 1870 viewed the annual product of the herd, as determined by experience, at a number which might be fixed, for the purposes of determining what the minimum annual rental should be at 100,000; but it recognized this number as being, in great measure, conjectural, that it might be excessive, or that accidents, not to be foreseen, might make it excessive. It, therefore, reserved to the secretary, as was proper, a power to further limit the number, not a general or arbitrary power, but one to be exercised only "if it shall become necessary for the preservation of such seals." The lessees necessarily took the hazard of this limited discretion, but it was the only hazard they took, so

far as the number which might be killed was concerned.

The Act of 1870 thus imposed *two distinct limitations* on the number:

*First.*—An *arbitrary, permanent, general* designation of 75,000 for St. Paul and 25,000 for St. George, 100,000 in all, which could never be *exceeded*.

*Second.*—A discretionary authority to the secretary to further *limit* "the killing" whenever the preservation of the seals required it. This last authority, while it may have *permitted*, did not *require*, any new distribution of the reduced catch; but would be properly exercised by limiting the killing, to say, 50,000, leaving the lessees to distribute the amount as they might think fit, subject, of course, to the arbitrary limit fixed by law.

The claim of the government is that the Act of 1874 *abrogated the whole system*. It asks the Court to *read into* the Act, after the word "designate," the words "at any time and from time to time." The defendants insist that the Act shall be interpreted just as it stands, so as to authorize *one new designation*, not exceeding in the aggregate the original limitation of 100,000, of the numbers to be taken on the two islands respectively, which new designation, when made, would replace the then existing permanent designation, and *become* the permanent designation. The precise question, therefore is which of these two meanings did Congress intend?

3. There are several distinct considerations, which, it is submitted, make it immediately and



clearly apparent what Congress intended. (1.) The provision of the Act of 1870, limiting the catch on the respective islands had reference only to the contemplated lease, and was designed only to *create* and to *limit* the rights of lessees under the lease. It applied to none other than *lessees*. It had direct reference, therefore, to *contracts* to be made. (2.) The first lease was then in existence and was to continue for sixteen years more; and therefore, Congress could not, during that period, and for that lease, change the designation *without the consent of the lessees*, and cannot be supposed to have intended any change without that assent. (3.) And, accordingly, Congress, by the Act of 1874, did not assume *itself* to make any change, but only to *authorize* the secretary to make one. It did not *require* him to make it; thus showing that it was not intended that the secretary should act until he procured that assent. (4.) He did *not* act until he had procured it. (5.) But he acted the *very next day* after the passage of the law, which shows clearly enough that the whole matter of the change was *agreed upon* beforehand between the secretary and the lessees. (6.) The change made was to *reduce* the number to be killed on St. George to 10,000, and to increase that on St. Paul to 90,000, leaving the maximum unchanged. (7.) The amended lease refers to the act and purports to have been executed pursuant to it (Record, p. 135).

What can be plainer than that it became known between the department and the lessees, before the act, that the existing designation permitted too many seals to be taken on St. George, but that the excess might be assigned to St. Paul, and that it was desirable that a corresponding

change should be made; that, as the existing designation was established by *law*, it could not be changed without the authority of law, and as it had become incorporated into a contract, it could not be changed without the assent of the contractors. That assent could be had at any moment, and what the act of Congress did, and all it did, was to give the requisite authority to the secretary.

The act, *of itself*, changed nothing; but when the authority given by it was *exercised* the change was effected.

The authority given was not restricted by any regard to the preservation of the seals, but was an absolute and unlimited one. What it purported to be, and what it actually was, was an authority to displace the existing *arbitrary* and *permanent* designation of 25,000 for St. George and 75,000 for St. Paul by a new designation, which, when made, would supersede the former one, and *become the permanent, arbitrary, general, designation*; but be, in the same manner, subject to the exercise of the *continuing discretionary* authority of the secretary to be exercised whenever necessary for the preservation of the seals. It left the discretionary authority still existing, but any exercise of it would, of course, entitle the lessees to a proportionate reduction of the rental.

4. Let us now examine the interpretation of the Government. It is that this amendatory statute, purporting only to authorize the secretary to designate the numbers to be taken on each island, was intended to change, and did change, the *whole scheme of leasing* so carefully devised by Congress; that it abrogated not only the *arbitrary* designation theretofore fixed

by Congress, but also the *discretionary* authority of the secretary to further limit *that*, when necessary for the preservation of the seals; and substituted in place of it an *unlimited arbitrary discretion* in the secretary, from time to time, and whenever he might choose, and for whatever purpose, to designate the number of seals which might be taken by any lessee, so that he might make the designation when any lease should be bid for, or for any year thereafter, and change it, at his pleasure, at any time during the year—fix it at 50,000 at the beginning of a lease, and the next year enlarge it to 100,000 or diminish it to 10,000, and at any time during the year further enlarge or restrict it at his pleasure, so that no bidder could have any real basis upon which to measure his offers, and no lessee could tell what provision or calculations he should make for the year, and that even the violent prohibition under the *modus vivendi* not to take more than 7,500 was a *designation* under this amending act of 1874! It would seem that argument were wholly unnecessary to determine which of these rival interpretations should be accepted; but the argument, if resorted to, will be found conclusive. That of the Government is rejected by every settled rule of statutory construction.

- a. It is a settled rule that every supplementary or amending statute must be so construed as to leave standing everything in the prior law which it does not purport to change; or, as the rule is shortly stated, repeals by *implication* are not favored. It is only when the subsequent statute is repugnant to the pre-existing law so that both cannot stand to-

gether, that the latter will be held to be abrogated or modified.

Endlich on Stat. Int., §§ 132, 210.

Bowen *vs.* Lease, 5 Hill, 221.

Wood *vs.* United States, 16 Pet., 341, 362.

McCool *vs.* Smith, 1 Black., 495.

The authorities supporting the above proposition are, in addition to those above cited, numberless and unvarying. They will be found collected in Endlich at the places referred to. A few extracts may be suitable here:

“An author must be supposed to be  
“consistent with himself; and, therefore, if  
“in one place he has expressed his mind  
“clearly, it ought to be presumed that he is  
“still of the same mind in another place,  
“unless it clearly appears that he has  
“changed it. In this respect, the work of  
“the Legislature is treated in the same  
“manner as that of any other author. The  
“language of every enactment must be so  
“construed, as far as possible, as to be con-  
“sistent with every other which it does not  
“in express terms modify or repeal. The  
“law, therefore, will not allow the revoca-  
“tion or alteration of a statute by construc-  
“tion when the words may have their  
“proper operation without it” (Endlich,  
§ 182).

“But repeal by implication is not favored.  
“It is a reasonable presumption that the  
“Legislature did not intend to keep really  
“contradictory enactments in the statute  
“book, or to effect so important a measure  
“as the repeal of a law without expressing  
“an intention to do so. Such an interpre-

" tation, therefore, is not to be adopted  
 " unless it be inevitable. Any reasonable  
 " construction which offers an escape from  
 " it is more likely to be in consonance with  
 " the real intention. Hence it is a rule  
 " founded in reason as well as in abundant  
 " authority, that, in order to give an act not  
 " covering the entire ground of an earlier  
 " one, nor clearly intended as a substitute  
 " for it, the effect of repealing it, the impli-  
 " cation of an intention to repeal must  
 " necessarily flow from the language used,  
 " disclosing a repugnancy between its pro-  
 " visions and those of the earlier law, so  
 " positive as to be irreconcilable by any fair,  
 " strict, or liberal construction of it, which  
 " would, without destroying its evident  
 " intent and meaning, find for it a reason-  
 " able field of operation, preserving at the  
 " same time the force of the earlier law,  
 " and construing both together in harmony  
 " with the whole course of legislation upon  
 " the subject " (Endlich, § 210).

Says Mr. Justice STORY: " The question  
 " then arises whether the sixty-ninth section  
 " of the Act of 1799, ch. 128, has been re-  
 " pealed, or whether it remains in full force.  
 " That it has not been expressly or by direct  
 " terms repealed is admitted; and the ques-  
 " tion resolves itself into the more narrow  
 " inquiry, whether it has been repealed by  
 " necessary implication. We say by neces-  
 " sary implication; for it is not sufficient to  
 " establish that subsequent laws cover some  
 " or even all of the cases provided for by it;  
 " for they may be merely affirmative, or  
 " accumulative, or auxiliary. But there  
 " must be a positive repugnancy between

"the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

Wood *vs.* The United States, 16 Pet., 362.

- b. What justification is offered for this wholesale repeal by implication of the main feature of the scheme adopted by the act of 1870? What fact is there showing any failure or insufficiency in that scheme? What superior wisdom is there in the scheme asserted to be substituted? What hint, even the most remote, does the act of 1874 contain that that Congress intended such a substitution? And where is there the slightest repugnancy created between the amendment and the original law if we give full operation to the amending statute, as we do when it is confined to an exercise of authority by the secretary to substitute *his* arbitrary designation of the numbers of the seals to be taken on each of the islands, in place of the one then existing?
- c. The Government's interpretation is equally in conflict with that other settled rule, by which all statutory powers are to be strictly construed and are not to be extended beyond the express terms in which they are created unless there are grounds which make an *implication* necessary. What the Government claims is that the statute should be interpreted as if it contained the words from "time to time." The approved maxim is "a purely statutory authority or right must

be pursued in strict compliance with the terms of the statute."

Endlich, § 353.

- d. Against this particular implication there is another rule to the effect that an authority conferred by statute must be deemed to be exhausted by a *single exercise*, unless it appears from the nature of the act, that its repeated exercise is necessary to accomplish the legislative purpose. Nothing of the sort appears here; indeed, the contrary appears. The designation of the maximum number made by the original act was *permanent*. To change this permanent number was the intent of Congress, and such change of necessity permitted but one act. The power to subsequently further limit it in the only exigency in which it might be needful to limit it, would still remain.

State *vs.* Chase, 5 Ohio St., 520.

Oregon Steam Nav. Co. *vs.* Portland, 2 Ore., 81.

State of New York *vs.* Woodruff, 32 N. Y., 355.

People *vs.* Haines, 49 N. Y., 587, 592.

- e. There is another objection which would be quite sufficient were it the only one. The Government's construction calls upon us to substitute a scheme which at once raises doubts, in place of one entirely simple and clear. If we should conclude, from *implication*, that the secretary might exercise his authority *from time to time*, numerous questions at once arise. Is this discretion entirely arbitrary, or must it be exercised only



when the preservation of the seals requires it, and can the lessee procure in any manner a review of any exercise of it? Is it to be exercised when a lease is made for the whole period of the lease, or may it be exercised at the beginning of each year? Is it restricted to the beginning of each year, or may it be exercised at any time during the year? Can the secretary bargain it away by agreeing in a lease, or at the beginning of every year, how many seals the lessee might take during the lease or during any particular year? Can he divide or modify his power, and stipulate that a certain number may be taken during a lease or during a particular year, subject to an exercise of a further discretionary power in him to further limit the killing, if the preservation of the seals in his judgment requires it?

Is the simple and clear scheme devised by the Act of 1870, and preserved in every feature by the Revised Statutes, to be set aside in favor of another so full of doubts, and this by *implication*?

- f. All these questions must be considered under the position taken by the Government. Upon the view of the defendants none of them arise. The designation by the law, or, when a different designation has once been made by the secretary under the Act of 1874, then such designation, determines the maximum number which may be taken; and the secretary has, at all times, either when making a lease, or at the beginning of a year, or during any year, the right to exercise a discretion, which he cannot bargain

away, to further "limit the killing" if the preservation of the seals requires it.

- h.* But, let another thing be considered; the act was plainly intended to have *immediately* whatever effect it was designed to have. The authority was to be exercised at once. It *was* exercised at once, and the then lessees *assented* to it. They, therefore, could not afterwards assert that it could not be put in operation as against them. Will any one believe that if, after the year 1874, the secretary had limited the first lessees to a catch of 10,000 *they* could have no reduction in the rental? And, yet, this result must surely follow under the Government's interpretation.

The learned Judge did not suppose that the view he took of the act necessarily involved this consequence. He, it must be supposed hastily, certainly very inconsistently, thought that it would be operative only on *future* leases; or rather that the new scheme would *in part* take effect as to the existing lease, and allow a new designation to be made which would be immediately operative, but that if the secretary should designate a less number than 100,000 the other part of the old scheme would still be operative, and secure to the lessees the benefit of a proportionate reduction in<sup>e</sup> rent! (Record, p. 15.) And he says that Congress did not *intend* that it should be operative to its *full* extent against the then lessees, but only as to *future* lessees. But nothing can be plainer than that Congress intended that whatever effect the act should have, it should *immediately* have. If any exception had been intended as to the

present lessees, such exception would have been expressed.

5. Again, the departmental construction has always been in accordance with the view above maintained. The present attitude of the government is a wholly *new* assertion. This is shown in two ways:

- (a.) By the character of the advertisement for bids, and the bids submitted in 1890. It is incredible that there should have been a complete misunderstanding between the department and the bidders of the nature of right which the government intended to let.

The advertisement at the letting in 1890 (Record, p. 84) was in all substantial respects similar to that in 1870 (Record, p. 69), except that in the former there was a limitation, for the first year, to 60,000, and a statement that for subsequent years the number would be determined "in accordance with the provisions of law." The provision of law thus mentioned must of course be understood as being those contained in the statutes.

What right did the secretary *assume* to exercise when he made this limitation? Was it the *absolute right to designate* under the act of 1874, or the discretionary right to limit killing under the Revised Statutes? The Government asserts—must assert—that it was the former; for the latter was abrogated, on its view, by the act of 1874. But it was *not* the former, and it *was* the latter. The former was a right to designate the number *for each island*, and could never be exercised without such designation. What the secre-

tary did by this advertisement was to "*limit killing*," without regard to numbers on each island, and this he could do only under the scheme of the act of 1870 and the Revised Statutes, which the Government asserts had been abrogated.

Turning to the *bids*, it will be perceived, on examination, that they were obviously based on the assumption that there was a normal maximum of 100,000, and that the limitation to 60,000 for the first year was an exercise of the secretary's discretionary power. All of them are consistent with this supposal, and some *require* it.

Take the Alaska Commercial Company's bid. This was the old lessee, which, if any one, understood the meaning and purpose of the act of 1874. In its bid it offered, in addition to gross rental, \$4.50 for each seal taken, and in its statement of what this<sup>r</sup> would yield to the Government it put the sum of \$450,000, showing clearly its reliance upon the normal maximum of 100,000 (Record, pp. 93, 94).

Take one of the bids of the *present lessee*, and its understanding is equally clear. The sum bid for each seal is \$5.11, and the statement is that this will net the Government, on the normal catch, \$511,000 (Record, p. 98).

Take another bid of the same company. It offered \$8.75 for each seal, on condition that the secretary would not exercise his *discretionary power* to limit killing after the first year (Record, pp. 103, 104).

- b. The departmental construction is further conclusively shown by *its own action under the present lease*. For each year up

to the one as to which this controversy has been started, it made a proportionate reduction of the rental based on the assumption of a fixed maximum of 100,000, except that for the first year, 1890, the reduction was applied only to the gross rental (Eighth Finding, p. 23).

6. The foregoing reasons for the adoption of the interpretation of the Act of 1874, herein maintained, are believed to be conclusive. They are, however, like most of the grounds upon which statutory interpretation rests, *inferential*. It so happens, however, that we have, in this case, from an entirely different source, a *direct* and authoritative *declaration* of the purpose intended by the act, derived from the *reports* of the *Congressional Committees*. These declare that the object of the act was simply and solely to correct the distribution between the two islands of the maximum number of 100,000, without altering the aggregate. This information was not in the possession of counsel at the trial and argument of the case in the Circuit Court.

The bill for this act was reported from the Committee on Commerce to the House by Mr. Conger, who made an oral report explaining its purpose.

When it was reported to the Senate, Mr. Chandler, of the Committee on Commerce, made a similar report of its purpose. The bill in each House was taken up and passed by unanimous consent upon these statements.

The following are the extracts from the *Congressional Record*:

“ A bill to amend the ‘ Act to Prevent the

“ ‘ Extermination of Fur-bearing animals in  
 “ ‘ Alaska,’ reported March 3d, 1874, from the  
 “ ‘ Committee on Commerce to the House by  
 “ ‘ Mr. Conger, who explained its purpose as  
 “ ‘ follows:

“ ‘ I wish to make a single remark in refer-  
 “ ‘ ence to this bill. It was prepared by the  
 “ ‘ Secretary of the Treasury and sent to the  
 “ ‘ Committee on Commerce by the House.  
 “ ‘ It provides that the secretary, in his dis-  
 “ ‘ cretion, may determine the number of seals  
 “ ‘ which may be killed on each of the islands  
 “ ‘ of St. Paul and St. George, and the time  
 “ ‘ when they may be killed. The Government  
 “ ‘ receives a revenue of \$261,000 a year as  
 “ ‘ a royalty for the killing of fur seals on  
 “ ‘ these islands, and it is all done under the  
 “ ‘ discretion of the Secretary of the Treas-  
 “ ‘ ury. One hundred thousand seals are per-  
 “ ‘ mitted to be killed annually. By the law  
 “ ‘ it is provided that three-quarters of that  
 “ ‘ number may be killed on the island of St.  
 “ ‘ Paul, and the remaining one-quarter on the  
 “ ‘ smaller island of St. George. In the state  
 “ ‘ of knowledge of these islands it was thought  
 “ ‘ that was the proper proportion. A Gov-  
 “ ‘ ernment agent was sent nearly two years  
 “ ‘ ago to examine the number and habits of the  
 “ ‘ fur seals on each island, and that agent, Mr.  
 “ ‘ W. H. Elliot, has made an exhaustive re-  
 “ ‘ port on the whole subject, which has been  
 “ ‘ printed. From that report it appears only  
 “ ‘ about one-twentieth or one-thirtieth of the  
 “ ‘ seals inhabit St. George Island. The pro-  
 “ ‘ portion, therefore, allowed by the law to  
 “ ‘ be taken from the smaller island is mani-  
 “ ‘ festly too large. The number, too, varies  
 “ ‘ on that island from year to year.

" ' The necessity for this legislation is that  
 " ' there is but one steamer leaving San Fran-  
 " ' cisco authorized by Government to go to  
 " ' these islands. A very good steamer leaves  
 " ' San Francisco in the spring, about the first  
 " ' of April, and then in the fall, to bring down  
 " ' the skins which have been taken. The  
 " ' Secretary of the Treasury desires this ac-  
 " ' tion of the House that he may send instruc-  
 " ' tions to the Government agent by the  
 " ' steamer leaving in April, and in order to  
 " ' do that this bill must pass the House and  
 " ' become a law at once.'

" ' The Bill makes no change in the law in  
 " ' regard to the number of fur seals which may  
 " ' be killed, but merely authorizes the Secre-  
 " ' tary of the Treasury to determine and to so  
 " ' instruct the agent of the government what  
 " ' number may be killed respectively on each  
 " ' of these islands. It also enables him to  
 " ' determine the time when these fur seals  
 " ' may be killed. The time is now fixed for  
 " ' four months in the year. It is found it  
 " ' should commence earlier, about the\*middle  
 " ' of May, as the fur seals arrive at that time.  
 " ' It would give longer for the taking of the  
 " ' fur seals, and thus prevent their being scared  
 " ' away from the islands.

" ' The committee are of the opinion that  
 " ' the Bill is a proper one to be passed.

" ' Bill reported in the Senate by Mr. Dennis.  
 " ' Mr. Chandler explained the bill as follows:  
 " ' The present law compels them to kill twenty-  
 " ' five thousand seals on the island of St.  
 " ' George and seventy-five thousand on the  
 " ' island of St. Paul. There are one-thirtieth  
 " ' as many seals on the island of St. George as  
 " ' on the island of St. Paul; and it is exter-



“minating the seals on the smaller island while  
 “it is leaving a large excess on the larger. It  
 “was a mistake in the original bill which is  
 “herein corrected.”

2. Certainly in the face of this evidence no doubt can any longer be indulged concerning the interpretation of this act, provided the act is *susceptible* of a construction in accordance with the declared purpose.

The *committees* of a legislative body are its authorized agencies for examining into the merits of proposed measures, and for putting into appropriate language the will of the body, or what they recommend as being fit to be made its will. Their reports accompanying the presentation of bills, of the purposes of such bills, are simply declarations of what the language employed means and will effect.

When a bill is reported from a committee with a statement, written or oral, from its responsible mouthpiece, and upon such statement all rules are, as in this case, immediately suspended and the measure at once passed without debate, no doubt is admissible that the body intended to do the very thing it was thus recommended to do.

3. The propriety of the resort by the Court to this means of information, when there is any doubt concerning the meaning of a statute, has been fully established.

- a. In the interpretation of a statute we must place ourselves as far as possible in the same position which the legislature occupied in enacting it, and to do this we must find out

what it proposed to do, or, as Mr. Justice Bradley expressed it, learn "the point before the legislative mind." (*Tremens vs. Sellers*, 123 U. S., 276, 285.) Indeed, the final rule of interpretation is to consider the *mischiefs which the statute intended to redress*; and how can we learn this so clearly as from a direct statement by an authorized committee of the legislature?

b. It is on this ground that *preambles*, although no part of the acts to which they are prefixed are universally resorted to for light as to the meaning. Says Mr. Chief Justice Tindal, in the case of the claim of the Dukedom of Sussex (8 Lond. Jur., 795): "But if any doubt arise from the terms employed by the Legislature, it has always been held as a safe means of collecting the intention, to call in aid the ground or cause of making the statute, and to have recourse to the preamble; which according to Chief Justice Dyer, is a key to open the minds of the makers of the act and the mischiefs which they intended to redress."

c. For the same reason a *petition* for an act is held most instructive in endeavoring to learn its object; but it is evidently less authoritative than the explicit statement of a committee accompanying the report of a bill.

*Furman vs. New York*; 5 Sand S.C., 16.

d. This Court has frequently resorted to the precise evidence now under notice, and has, in one instance at least, made its decision

upon the strength of such evidence. In the case of *Blake vs. National Banks* (23 Wall, 307), a certain construction was insisted upon by the defendants of a statutory provision imposing taxes upon the incomes of corporations. It was based upon the *literal* interpretation of the language employed. The result of it would be that whereas Congress imposed a tax upon the incomes of individuals during the whole of the years 1870 and 1871, yet in the case of corporations there would be a hiatus from August 1 till 1870, during which no tax was imposed. The Court said:

“ It is impossible to believe that Congress  
 “ intended to make this discrimination. It  
 “ is entirely unreasonable, and is not in  
 “ harmony with the well known views of  
 “ Congress on the subject.”

It is thereupon resorted to the history of the framing and passage of the act by an appeal to the same evidence as that which we have above resorted to, the Congressional Record, and from that evidence came to the conclusion that the intent of Congress was not what it was asserted by the defendants in the case to be.

The familiar practice of many Courts in the interpretation of the revisions of statutes by Commissioners to borrow aid in interpretation from the reports of the Commissioners stating the purposes in view is based upon the same considerations.

Endlich on Stat. Int., §§ 62-69.

c. This species of evidence is quite different

from the speeches or declarations of members of the legislature in the course of debate.

These indicate their views alone, and are for manifest reasons of little or no value in ascertaining the object of the body generally.

f. That the case is one of doubt, and therefore a fit one for resorting to this source of light respecting the intention, is entirely plain. The law purports to be an amendment of the Act of 1870. That Act established a *system* of leasing, the fundamental feature of which was to make the thing leased a right to take the annual product of the seal herds of two islands for a rent to be determined by bidding. The extent of the right was limited by the Act to 75,000 from St. Paul's, and 25,000 from St. George (100,000 in all), with a discretion in the secretary to reduce the number in case the preservation of the seals required it, but with a corresponding reduction of the rent. This limitation was a double one. It limited the whole number to be taken to 100,000, which was a matter involving directly the extent of the right to be acquired by the lessees. It also *distributed* this number between the two islands, which did not affect the value of the right, and was designed to make the latter proportional to the size and capabilities of the two herds.

The amending Act did not, itself, change anything, or *require* the secretary to change anything. It *authorized* him to change the designations of the numbers to be taken respectively from the two islands, and of the months in which they were to be taken. Under the language employed, taken liter-

ally, he might, possibly, have power to designate numbers which would increase the maximum above, or reduced it below 100,000; or, only, while preserving that maximum, to change the relative numbers to be taken on each island. Which was intended? There is a doubt on the *face* of the act; for, if the first was intended, the use of the word "respectively" was needless; if the second, that word was proper and significant. One of the meanings of "respectively" is "relatively," and to designate the numbers from each island *respectively*, is to designate the *relative* numbers from each island, that is, to change the *relation* or *ratio* which the number then prescribed for each island bore to the other. When we come to apply the Act to its subject matter, it becomes difficult, indeed impossible, to believe that anything more was intended. The wider meaning would make the Act change the whole system of leasing, authorize a government officer to destroy existing rights based upon solemn contract, and introduce many doubts as to whether the authority could be exercised repeatedly, and from time to time, or once only.

On turning to the reports of the committees, every doubt is immediately dispelled. It is declared, in terms, that "the bill makes no change in the law in regard to the number of fur seals which may be killed, but merely authorizes the Secretary of the Treasury to determine, and to so instruct the agent of the government, what number may be killed *respectively* on each of these islands," thus showing the sense in which the word "respectively" was employed.

7. And all this is confirmed by what was actually *done* under the act, which also shows that the whole thing had been previously agreed to between the secretary and the lessees. The designation was immediately made of 90,000 for St. Paul and 10,000 for St. George and the lease changed accordingly the next day. (Record, pp. 134, 135).

8. And, finally, upon this whole question, of the interpretation of these successive pieces of legislation, the act of 1870, the revision of it in 1874, and the amending act of 1874, resulting in the question whether this present lease contemplates a maximum catch of 100,000, with a discretion in the secretary to further limit it on the single contingency of its being necessary for the preservation of the seals, and with a corresponding reduction of rent in case of such further limitation the *repeated action* of the Government itself plainly shows its own conviction that the interpretation of the plaintiffs in error is the true one. This is not indeed an *estoppel*, but it shows such a uniform interpretation agreed to by both parties as to make it matter of wonder that the government should now call upon any tribunal to reverse its own interpretation.

a. For the year 1890 the take was 21,000, and in the settlement with the department the gross rental was reduced on the assumption of a maximum quota allowed to the lessees of 100,000 (Eighth Finding, Record, p. 23.) Whether the claim was, or was not, advanced that the *per capita* rental should also be reduced does not appear; but the reduction actually allowed is not, for that

reason, less significant upon the quest now under notice.

- b. For the year 1891 the take was 13,482 and in the settlement both the gross and the *per capita* rental was reduced upon the assumption of a maximum quota of 100,000. (Record, p. 140).
- c. For the year 1892, that immediately preceding the year in question, the take was 7,509 and the settlement embraced a like reduction on the same assumption. (Record pp. 142, 143). See also Eighth Finding, p. 23.
- d. The treaty of April, 1892, between the U. S. and Great Britain for the arbitration held at Paris in 1893, by its terms provided for the submission of claims against Great Britain of two descriptions, *first* those of the United States for damages sustained by it in consequence of the limitation of the catch to 7,500 and those sustained by the present lessees, the North American Commercial Company.

In the statement in the *case* made up by the United States of these claims, it is assumed, and indeed stated, that a maximum quota of 100,000 is "prescribed by statute; and the amount of the claims is calculated upon that basis." (Record, pp. 78, 79, 80).



**Seventh Point.**—It being shown that the obligation of the Government was to allow one hundred thousand seals to be taken under the lease, unless the secretary was of opinion that the condition of the herd required a limitation of that number and made a limitation on that ground, it follows that the United States cannot maintain this action. The secretary never made any such limitation, and yet the Government would not allow the company to take the annual product.

1. The limitation actually made was in pursuance of an agreement made by the Government of the United States with a foreign nation for the sake of facilitating a negotiation with that nation. It was, so far as the defendants are concerned, entirely arbitrary. It was the mere exercise of power on the part of the United States, and was not and did not in any manner purport to be in pursuance of the provisions of the statute (9th, 10th, 11th and 12th Findings).
2. Moreover, it was no act of the Secretary of the Treasury whatever. He had no concern with it. It was the direct act of the United States Government. All he had to do with it was to communicate his order to the lessees in pursuance of this act of the Government itself.
3. It was not in any manner assented to by the lessees. True, they made no opposition to it; but all opposition would have been absolutely ineffectual. They obeyed, as they were obliged to obey, the order of the Government.

4. To hold that these lessees under a contract securing to them the whole annual product of the herd, limited only by the number of 100,000 subject to the discretionary power of the secretary, as above mentioned, could be deprived of the right thus secured to them, and so deprived of that right by the intervention of the arbitrary authority of the United States, the lessor, and yet that that very lessor could, notwithstanding, recover the whole annual rental stipulated for by the lease, is utterly inconsistent with any view of the law of contracts.

**Eighth Point.**—It is possible, however, that it may be thought that although the order of the Government under the *modus vivendi* forbidding the lessees to take any seals was, in form, peremptory, yet that there are some evidences that the lessees conceived themselves entitled to the skins of the 7,500 and actually received them, under the lease, and that consequently the Government is entitled to maintain this action. This depends upon what the understanding or agreement was under which the lessees received the 7,500 skins, for it must have been under some agreement.

It is submitted that according to the true construction of this transaction, they received them pursuant to an *implied* understanding *outside* of the lease, that they were to pay for them their reasonable value, after deducting the fifty cents per skin paid to the natives for their services.

1. It will be remembered that the order of the Secretary of the Treasury was, not that the lessee should take 7,500 skins only, but that

they should not take *any* skins. (Tenth Finding, p. 24.)

2. It will further be noted that the taking of this 7,500 was industriously made a taking by the Government itself under *its* agents, and not by the lessees under their agents. Both the testimony and the written orders or notices of the Government agents very clearly show this (Same Finding as above).
3. It will also be noted that by the *modus vivendi* it was expressly agreed that these seals were to be taken, not for their *skins*, but as *food* for natives (9th Finding, p. 23).
4. It seems difficult with this evidence before us, to say that these skins were in any manner taken under the lease.

**Ninth Point.**—If however, we were to indulge the assumption that the skins were accepted as if taken in some manner under the lease, this action may be maintained, and the further question would be one relating wholly to the amount which might be recovered by the Government.

1. It is not to be denied that there seems to have been an *expectation* both on the part of the lessees and of the treasury officers, including the secretary, that the lessees were in some manner to have the skins of these seals; nor is it to be denied that, although they were really *taken* under the direction of the Government and by its agents, and in a manner quite different from that always pursued when seals were

taken by the lessees under the lease, they were yet turned over to the lessees very much in the same manner as skins of seals regularly taken by the lessees.

2. It is submitted that the only reason why they were turned over to the lessees was that there were no other persons who could conveniently dispose of the skins, and that the disposition of the matter in respect to price, etc., was to be left for future arrangement. It may be very probable that the lessees might be willing to pay for them such sum as they would have been obliged to pay had the take been regularly and properly limited by the secretary to a quota of 7,500. Otherwise they would be obliged to pay their reasonable value, and that might be a larger sum. But this would wholly fail to establish a right in the United States Government to maintain this action.

**Tenth Point.**—Assuming, however, that the case is to be treated in the same manner as if these skins were received *under the lease*, and *as if* the secretary had himself made the reduction by an exercise of his discretionary power, and the lessees had arranged to receive them under the lease, it is entirely clear that the Government can recover only a reduced rental.

1. If we are correct in our construction of the statute this follows as a necessary consequence. The quota being reduced, the rental must be

reduced accordingly, and in the same proportion as 7,500 bears to 100,000. It is not possible that a *wrongful* limitation of the killing would confer upon the Government greater rights than a *rightful* limitation.

**Eleventh Point.**—But here the Government makes the point that even if the *rental* is reduced, the \$7.62½ to be paid for each skin is not subject to the reduction because it is not *rental*, but a *royalty*. There is no color of foundation for this proposition.

1. The statutory authority to the Secretary of the Treasury to make a lease permits him to make it for a *rental* and for that alone. Whatever stipulation he might put, the lessees under to make compensation for the right or privilege leased, it must be a stipulation for *rental* only.

2. The advertisement of the secretary to secure bids called for a bidding only of *rental*, not of royalty, or of any other sum but rental.

Of course the two dollars to be paid as a revenue tax was well understood not to be rental because it was required by law, not as rental, but to be paid, *eo nomine*, as a revenue tax.

3. When the lessees made their bids they made them in pursuance of the offer, and therefore intended their bids to be of *rental* only.

4. The amounts thus agreed to be paid both in letter and in substance correspond to the precise definition of *rental*. It is a sum agreed to be paid as a *return* for property *leased*, just as much as the gross sum which was bid.

In *amount* the *per capita* rental is the principal thing. The gross rental is but a small item in comparison. The former would amount, on a take of 60,000, to \$457,500, against \$60,000 for the latter. We cannot suppose that a form of bid was intended which would render the provision for reducing rental comparatively unimportant.

5. Being, therefore, in every sense of the word, *rental*, it is just as subject to reduction as the gross sum.

6. The various settlements which took place in respect to prior years between the lessees and the Secretary of the Treasury show that this was the understanding.

An exception to this is found in the settlement for 1890. Apparently on this occasion the lessees were not advised of their rights and did not make the claim, but when it was made it was acceded to, and the Attorney General upon being consulted by the secretary affirmed that construction of the lease in his opinion.

7. The notion that this sum should not be subject to reduction seems to have arisen from the circumstance that it was a sum to be paid for each skin taken, and that therefore the rent was less as the number was less. The notion is that the rent reduces itself, as it were, and therefore is not to be further reduced.

This, however, is an erroneous view. The rental in no manner reduces itself. The *un-reduced* rental is \$7.62½ for each skin taken.

8. It was entirely optional to the bidders either to bid the whole rental in the shape of a gross sum, or partly of a gross sum and partly of a *per capita* amount on each seal. Surely the question of the reduction of rental cannot be made to depend upon the *form* in which the bid was made. The reason for making a bid of a gross sum at all was the necessity of complying with the statute which made a bid of at least \$50,000 requisite, subject to the reduction required by the statutes.

9. The notion advanced on behalf of the Government seems to be that there is some injustice in reducing a rental made by its terms dependent upon the amount of the harvest; but a little reflection will show that there is no foundation for this view. We must not assume, for it is not true, that the lessees would make the same profit *on each seal*, whether a small or a large number were taken. *Each seal costs more as the number taken is less.*

The lessees are required at the beginning of each year *to incur substantially the same expense for their privileges under the lease, whatever may be the number of seals taken.* This expense is very large and a very considerable number of skins must be secured before the lessees can realize any profit at all; and after their profits begin, the amount of their profit depends altogether upon the number of seals taken. If the price of skins is very high their expenses may be reimbursed by a comparatively small num-



ber of skins; but if the price is low they would have to take a very large number in order to extinguish the expense. The price of these skins is a matter depending almost entirely upon fashion, which creates the demand, and the lessees in taking a lease for twenty years are obliged to contemplate the possibility, and the probability, that the demand might become very largely diminished from what it was when the lease was executed, the skins at that time, in consequence of fashion, being in great demand. It was within the easy range of probability that it might take 20,000 skins to pay the expenses to which the lessees had subjected themselves, and a large additional number to pay even the reduced rental which the lessees would be obliged to pay in addition to their expenses. It was within the range of easy possibility and even of probability, that the price of skins would fall as low as \$10, in which case, were there no reduction of that part of the rental made up of the \$7.62½ for each skin, the lessees would be subjected to a loss, no matter how many they took, *indeed the loss would be greater the more they took*. No such result could possibly have been intended. It is only when the price of skins is very high—a condition which cannot be by any means contemplated as permanent—that any foundation whatsoever appears for the suggestion that a reduction of the \$7.62½ would be an unreasonable concession to the lessees. We must put ourselves in the position in which the parties stood when the lease was made, take into view the fact that the lessees were subjecting themselves to pecuniary obligations lasting during a period of twenty years and covering every possibility in

the way of a variation in price, in order to consider this question of reasonableness, if it has anything to do with the construction of the lease itself.

Let it be supposed that 100,000 seals were taken in a year. The obligations of the lessees would be as follows:

Expenses, to comply with the obligations in the lease other than rent, say . . . . .	\$100,000
Gross rental . . . . .	60,000
Per capita rental . . . .	762,500
Revenue tax . . . . .	200,000
	<hr/>
	\$1,122,500

It will be seen that in this case the lessees would be obliged to obtain more than \$11 for each skin before they could make anything, and yet that at the same time the United States would be making nearly a million of dollars on the transaction, and if the price of the skins should run down as low as \$8—and they might easily reach a lower price—the lessees would be subjected, provided they took 100,000 skins, which they might well do, not knowing what the price would be when the skins reached a market, to a loss of more than \$300,000.

Let it be supposed that the secretary had properly limited the number in some particular year to 50,000 skins, and that number had been taken, and the price of the skins had been \$8. In that case, upon our view of the construction of the lease in the matter of reducing the rent,

the obligations of the lessees would have been as follows:

Expenses, say . . . . .	\$100,000
Gross rental . . . . .	30,000
Per capita rental . . . . .	381,250
Revenue tax . . . . .	100,000
	<hr/>
	\$611,250

In this case there would have been a loss of over \$200,000 to the lessees, while the Government would have received over \$600,000.

Before the lessees could have made as much as \$200,000 for the year, the prices of skins must reach \$16 each, and, while they were making \$200,000 only, the Government would have been receiving, as just stated, more than \$600,000.

These considerations serve to show the hazardous nature of the undertaking and also to show that justice and reasonableness, if these considerations are taken into view, require that the reduction should be applied not only to the gross rental, but to the per capita rental.

10. But the language of the statute itself is peremptory. Whenever there is a reduction made by the secretary in the number taken, the rental must be reduced proportionately, and there is no legal supposal which can be indulged that the per capita rental is not rental just as much as the gross rental.

**Twelfth Point.**—If the computation is made of the amount due the Government upon the view that a reduction is to be made of the whole rental, per capita as well as gross, the amount thus due is \$23,789.50 (see Exhibits 26, 27 and 31, pp. 143, 156), the amount which was tendered by the lessees before the suit was brought.

1. This offer was made not as a waiver of any right on the part of the lessees, but by way of an adjustment to which they were willing to assent in accordance with previous settlements between them and the Government, rather than encounter a litigation.

**Thirteenth Point.**—In the event that the Court should be of opinion that the Government can maintain the action in respect to the 7,500 skins, either for the whole rental, or for a reduced rental, it will be necessary to determine the question respecting the counterclaim set up by the defendants and its amount.

This counterclaim was fully established.

1. The true construction of the lease as hereinbefore shown, gave the lessees the right to the whole annual product of the herd, limited only by the number of 100,000, unless the secretary, in the exercise of the discretion entrusted to him under the law, made a further restriction. That restriction he never did make. But by the arbitrary order of the Government the lessees received, and received under the lease (upon the view now indulged) 7,500.

The right to an allowance by way of dam-

ages against the Government for the breach of its obligation thus committed, is clear. The only question is as to its amount.

We have indulged the view necessary to the maintenance of the action of the Government, that the 7,500 skins were in some manner received under the lease; but there is no evidence tending in any manner to establish that the lessees ever waived, in any form, their rights to the full annual product of the herd limited as above mentioned.

2. The contrary, however, is fully and completely shown. From the first they have made a demand upon the Government for damages and that demand has never been resisted on any ground to the effect that the lessees had waived it.

**Fourteenth Point.**—The point was made by the Government before the Trial Court that the damages claimed were speculative, and that they could not be allowed at all. This position cannot be maintained.

1. It certainly cannot be contended that the damages were *uncertain*, in the sense that they were incapable of *ascertainment*. In their nature they were entirely susceptible of proof, and proof was fully supplied. It was fully proved that the condition of the herd was such that the defendants could have taken, but for the peremptory prohibition of the Government, at least 20,000 marketable skins. The market

price of the skins was proved, and also the sum which the taking of them would have cost. The difference would have been a clear profit, and this was what the defendants lost.

That these damages were in the nature of *profits* is no objection to a recovery for them. Lost *profits* are the damages in numerous cases of breach of contract. In many contracts, as, for instance, those to execute work for another, to lease a farm, to hire a ship, the *profit* to be made out of the transaction is the thing really purchased, and the amount of such profit is strictly the measure of the damages. In ascertaining the amount of the profit we are not, indeed, in general permitted to prove the loss of a *particular bargain*, but we can prove the *things*, or the *rights* to things, which the claimant of damages would have acquired by the performance of the contract, and the value of those things or rights. In this case the defendants would have acquired the *right* to take 20,000 seals, and the value of this right would have been the market value of the seals less the expense of marketing them. \*

2. Damages must not indeed be too *remote*. The object of this rule is to avoid judgments based upon supposed results as likely not to happen as to happen. The law seeks to avoid, as far as possible, the merely *speculative*, the *uncertain*, as a ground of decision. If a passenger were wrongfully put off a railroad train in a wet night and contracted a malady which disabled him from labor for a time, he might prove as his damages the fair value of his time, but probably not the fact that some one offered him a very remunerative employment which his illness prevented him from accepting.

The specifications of uncertainty and remoteness made by the Government were that it was not certain that the defendants would really have taken 20,000 seals, or that they would, or could, have sold the skins for the amount claimed. But this is simply introducing the uncertainty and speculation which it is the object of the rule to exclude. Surely if a man has the *right* to take 20,000 skins which he can sell at a profit of \$10 each, he will exercise that right, and if such skins are at the time sold in the market at \$20 each in large quantities, it is idle to suggest that we do not know what 20,000 more would have produced.

3. The *rule* founded on the considerations above mentioned has *two* expressions; one adapted to cases of *tort*, and the other to those of contract. The first is that the damages recoverable *are such as, in the ordinary course of things, would naturally flow from the wrongful act.* The second, that they are such as *in the ordinary course of things would naturally flow from the breach, or such as appear to have been within the contemplation of the parties.*

Wood's *Mayne on Damages*, §52.

4. This rule is well stated and illustrated in *Masterton vs. The Mayor of Brooklyn* (7 Hill, 62), the leading authority upon this point in the Courts of Common Law in this country. This case arose out of a contract to furnish marble to build a city hall in Brooklyn. In giving the opinion of the Court Mr. Chief Justice NELSON said:

"When the books and cases speak of the  
 "profits anticipated from a good bargain as  
 "matters too remote and uncertain to be taken



" into account in ascertaining the true measure  
 " of the damages, they usually have reference  
 " to dependent and collateral engagements  
 " entered into on the faith and expectation of  
 " the performance of the principal contract.  
 " But profits or advantages which are the direct  
 " and immediate fruits of the contract entered  
 " into between the parties stand upon a different footing. They are part and parcel of  
 " the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement for the arrangement." In the United States *vs. Speed* (8 Wall., 84-85), this Court said: " The leading case on this subject in this country is *Masterton vs. Brooklyn*."

In a leading English case, *Hadley vs. Baxendale* (9 Exch., 34), the damages recoverable for a breach of contract were stated to be " such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the natural course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

**Fifteenth Point.**—The objection made by the Government, and sustained by the Court below, to the allowance in favor of the defendants of the damages sustained by them in consequence of the unwarranted prohibition to take seals was that the claim for such damages had never been presented to the proper accounting officers and disallowed by them, as required by that statute. This objection ought not to prevail.

1. It would seem that the evidence of presentation and disallowance were sufficient. The claim was presented to the *head* of the Treasury Department. That officer *received* the claim. If it was his duty (and it is submitted that it was) to refer it to his proper subordinate, there is a *presumption* that the duty was discharged, and therefore that the claim was presented to the proper accounting officer. The secretary also informed the defendants that their claim was rejected. Is not this sufficient presumptive evidence of the disallowance of the claim by the proper accounting officer?

**Sixteenth Point.**—But it is quite unnecessary to press the foregoing point. There is another ground, wholly independent of any statutes of set-off, believed to be quite incontestable, upon which the claim of the defendants may be supported. It was matter of *defence* to the action.

1. The common law system of procedure permitted a plaintiff to have a judicial examina-

tion of his claim unembarrassed by any cross claims which the defendant might have against him. The latter had the same privilege of impleading the plaintiff, and was left to such remedy.

The circumstance, however, that the plaintiff owed the defendant a debt was certainly a good reason why the latter should refuse to pay the former a debt that he might owe him, or the balance only, if any; and, in some cases, such as the insolvency of the plaintiff, justice really required that he should be sustained in such refusal. Considerations of convenience, and of avoiding or diminishing litigation, united in recommending some method which would permit a suit instituted by one party to enforce a demand to be made the occasion for the presentation of rival claims by the defendant.

This was the origin of *statutes of set-off*, by which, to a certain extent and under certain limitations, a defendant, without disputing the justice of the plaintiffs' claims, was permitted to *satisfy* it, in whole or in part, by proving a claim of his own against the plaintiff.

Such a privilege must necessarily be so limited as not to permit a defendant to set up a claim which would call for a judicial inquiry essentially different from that which the plaintiff had invoked, or which would allow the policy of bankrupt acts to be defeated, and the statutes and the practice of set-off were accompanied with restrictions suitable to such ends.

2. But it was always quite possible that the *same facts* which gave a defendant a valid claim for an independent recovery against a plaintiff would be *equally pertinent and equally effective* to destroy, or reduce the claim which the

plaintiff had against him: in other words, that the same facts were equally susceptible of being made the ground of *attack*, or *defence*. In such cases the party seeking the benefit of such facts, while he could not employ them in *both* ways, might employ them in *either*, as he might choose; and if he chose to employ them by way of *defence* the statutory law of *set-off* had no application to the case. If he chose to employ them in the way of *attack*, he was driven to his independent action unless some statute of set-off enabled him to make his claim in that form. The modern procedure in many jurisdictions furnishes increased facilities in this direction under the head of *counter-claims* for causes of action arising out of *the same transaction* as that forming the subject of the action.

3. The *defensive* use of such matters, very commonly called *recoupment*, has been variously explained by different courts, sometimes as part of the law of *contracts*, under the head of *partial failure of consideration*; sometimes as part of the policy which forbids *circuity of action*; and sometimes on grounds of *general justice* and *equity*. It really rests upon the combined force of all these considerations.
4. In early times there was a disposition to restrict the defensive use of such matters and to require that they be made the subject of claim in another action, for the reason, as was thought, that otherwise the plaintiff might be *surprised*; but this view was plainly inconsistent with the nature of the right, and has never received the assent of the best authorities, and the universal inclination now is, and particularly

in this court, to favor such use whenever it may be sought, as being founded on the most scientific view of legal procedure, and required by the plainest considerations of justice and convenience. Says Mr. Justice Daniel, on giving the opinion of this Court in *Withers vs. Greene* (9 How., 213, 230): " But, however, the rule  
 " laid down by the courts in England should be  
 " understood, it has repeatedly been decided  
 " by learned and able judges in our own coun-  
 " try, when acting, too, not in virtue of a  
 " statutory license or provision, but upon the  
 " principles of justice and convenience, and with  
 " a view of preventing litigation and expense,  
 " that where fraud has occurred in obtaining  
 " or in the performance of contracts, or where  
 " there has been a failure of consideration,  
 " total or partial, or a breach of warranty,  
 " fraudulent or otherwise, all or any of these  
 " facts may be relied on in defence by a party  
 " when sued on such contracts."

These views were expressly and pointedly re-affirmed soon after in the case of *Van Buren v. Digges*; (11 How. 461) and have been still more recently considered and approved in the opinion pronounced by Mr. Justice Gray in *Dushane v. Benedict* (120 U. S. 630). The multitude of authorities upon this subject are collected and, in some measure, arranged, in *Am. & Eng. Cy.* Vol. 22, pp. 343, *et seq.*

5. The leading element which gives to such claims their *defensive* character is that they sprung out of the *same transaction* with that which formed the subject of the action, so that, in view of the several and respective relations which the parties occupied towards each other, or, in

*cases of contract*, the several and respective obligations which they assumed towards each other, the whole question may be stated to be: Does the defendant owe anything to the plaintiff and, if so, how much?

It is well expressed by Stevens J. in *Lufburrow v. Henderson* (30 Ga. 482). "The comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract treating it as an entirety and treating the things done and stipulated to be done on each side, as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, it sums up the grievances on each side instead of the plaintiff's side only, strikes a balance and gives the difference to the plaintiff if it is in his favor."

The same doctrine has been declared in many other cases.

In *Myers vs. Estelle* (47 Miss., 4), which was an action in *assumpsit* on promissory notes given for the price of land, the defence was set up of a breach of warranty and false and fraudulent representations inducing the purchase of the land. The Court said: "One demand is considered as reduced or liquidated by the other, and the surplus is regarded as the real cause of action. The defendant's claim is deducted from that of the plaintiff, and the latter recovers the excess only. The defendant is not allowed to recover any balance."

In this case it will be perceived that the matter set up by the defendant did not fall within

any statute of set-off, but it was yet allowed as a *defence*. This case was cited with apparent approval in *Farrar vs. Churchill* (135 U. S., 614).

Mr. Waite, in his work on Actions and Defences (Vol. 7, page 545), says in dealing with the subject of recoupment: "The doctrine is "but a liberal and beneficent improvement "upon the old doctrine of failure of consideration. It looks through the whole contract, "treating it as an entirety, and treating the "things done and stipulated to be done on "each side as consideration for the things done "or stipulated to be done on the other. In "regard to the distinction between recoupment "and set-off, it is to be observed that the former is contra-distinguished from the latter in "these three essential particulars: 1st, in being "confined to matters arising out of and connected with the transaction or contract upon "which the suit is brought; 2nd, in having no "regard to whether or not such matter is liquidated or unliquidated; 3rd, that the remedy "is not the subject of statutory regulation, "but is controlled by the rules of the common "law."

*Railroad vs. Smith*, 21 Wall, 261.

*Van Buren vs. Diggs*, 11 How., 461.

*Winder vs. Baldwin*, 14 How., 434.

*Stillwell Mfg. Co. vs. Phelps*, 130 U. S., 520.

*Whitbeck vs. Skinner*, 7 Hill, 53.

*Lynch vs. Baldwin*, 69 Ill., 210.

*Keating vs. Springer*, 146 Ill., 481.

*Stacy vs. Kemp*, 97 Mass., 166.

*Carey vs. Guillow*, 105 Mass., 18.

*Davis vs. Bean*, 114 Mass., 358,

support the same views.



6. The question, therefore, in the present case whether the matter of the refusal by the Government to allow to the defendants the full benefit of the right it had agreed by the very instrument on which the action was brought to give them, can be set up to defeat, either in whole or in part, the claim made by the Government should be promptly answered in the affirmative. It is simply a question whether the matter is not upon principles both of justice and expediency really *defensive* in its nature.

The principle is that justice does not permit a party to a transaction or a contract who has been guilty of a wrong, or a default, towards the other party to withhold that wrong or default from judicial observation and *select* some feature of the transaction or contract in which the latter is in default and claim a recovery against him. What justice requires is that the *whole transaction*, and the conduct of both parties towards each other should be taken into view at once, and a determination be had whether, upon such consideration, the plaintiff is entitled to recover anything and, if anything, how much.

7. The case is a typical illustration of the doctrine invoked. Assuming as, for the sake of the argument, we must, that the Government had wrongfully refused to give the defendants the thing the price for which it was seeking to recover, we have a case upon which by the strict technical rules of procedure, as they were once applied, it could have no recovery at all upon the contract.

It had not made performance on its part. It is permitted to maintain its action upon equi-

table principles only. If equity and justice declare that technical rules should be so far relaxed as to permit the Government to recover, under the contract, what may be fairly and justly due for the skins which the defendants really received, the same equity and justice must be applied to the whole transaction, and the defendants be declared to owe so much only, as the amount thus due exceeds the amount of which they have been deprived by the wrongful action of the Government.

The circumstance that the Government is the party against whom the recoupment is claimed, is of no consequence. There is no limit to the *defences* which may be set up against the claim of the Government. If the matter relied upon is really of the nature of a *defence*, it is as fully available as if the plaintiff were a private individual. This necessarily follows as a consequence of the doctrine established by the authorities already cited. That doctrine is to the effect that such defensive matter may always be made use of without borrowing any aid from the statutes of set-off. There have been numbers of instances in which the attempt has been made to meet the claims of a state by something in the nature of *set-off*. Such claims have never succeeded for the obvious reason that to allow them would be indirectly allowing the prosecution of a suit against the Government; but the courts, in pointing out this obstacle to set-offs in suits against the Government, where there is no statute giving permission, have been careful to observe that the case would be different if the matter alleged as the foundation of the claim were of the nature of recoupment.

Thus in *State vs. Baltimore & Ohio R. R. Co.* (34 Md., 344), the Court says: "Upon the question raised by the demurrer to the second plea, we concur in the ruling of the Superior Court. In actions instituted by the State it is well settled that no right of set-off exists unless in cases where such defence is expressly allowed by statute for the reason that the State being sovereign is not liable to be sued by an individual or a corporation. \* \* \* It is very clear that the subject matter of defence alleged in the plea cannot constitute a ground for *recoupment*, because the alleged cross claim does not arise in any manner out of the contract or transaction which constitutes the cause of action, but is an entirely separate and distinct claim, having no connection therewith."

8. The distinction between this case and those of set-off is palpable. In set-off the plaintiff is guilty of no wrong or default in connection with his claim. His claim is fully established; but is satisfied or extinguished by an independant cross-claim against the plaintiff. But in *recoupment* the plaintiff is *guilty*, and the real inquiry is whether, notwithstanding his guilt, he ought, in justice, to have a recovery, and of how much.

9. Undoubtedly, the matter thus recouped *might* be made the subject of an independent suit; but this does not destroy its *defensive* character if the defendant chooses to present it in its defensive aspect. The defendant may, if he chooses, assent to the proposal of

the plaintiff to *select* one feature of the transaction for judicial examination, and afterwards by an action in his own name, pursue the same course by selecting another.

Undoubtedly also, he must abide the consequences of his election. He can bring his claim before the Court but *once*, and if he establishes defensively a claim exceeding that of the plaintiff, he must submit to a loss of the excess.

The practice allowed in set-off of obtaining a *certificate* of the excess which would be conclusive evidence in a future action by him, stands upon statute, or judicial rule, which is not available in recoupment.

**Lastly.**—The judgment should be reversed and final judgment be ordered for the plaintiffs in error.

JAMES C. CARTER,  
Of Counsel for Plaintiffs in Error.

**APPENDIX.****CHAPTER CLXXXIX.**

An Act to Prevent the Extermination of Fur-bearing Animals in Alaska.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That it shall be unlawful to kill any fur-seal upon the islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September and October, in each year; and it shall be unlawful to kill such seals at any time by the use of fire-arms, or use other means tending to drive the seals away from said islands: PROVIDED, That the natives of said islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use, which killing shall be limited and controlled by such regulations as shall be prescribed by the Secretary of the Treasury.

Sec. 2. AND BE IT FURTHER ENACTED, That it shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to said islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and any person who shall violate either of the provisions of this or the first section of this act shall be punished, on conviction thereof, for each offence by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment not exceeding six months, or by such

fine and imprisonment both, at the discretion of the court having jurisdiction and taking cognizance of the offence; and all vessels, their tackle, apparel, and furniture, whose crew shall be found engaged in the violation of any of the provisions of this act shall be forfeited to the United States.

Sec. 3. AND BE IT FURTHER ENACTED, That for the period of twenty years from and after the passage of this act the number of fur-seals which may be killed for their skins upon the island of Saint Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur-seals which may be killed for their skins upon the island of Saint George is hereby limited and restricted to twenty-five thousand per annum: PROVIDED, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act.

Sec. 4. AND BE IT FURTHER ENACTED, That immediately after the passage of this act the Secretary of the Treasury shall lease, for the rental mentioned in section six of this act, to proper and responsible parties, to the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the first day of May, eighteen hundred and seventy, the right to engage in the business of taking fur seals on the islands of Saint Paul and Saint George, and to send a vessel or vessels to said islands for the skins of such seals, giving to

the lessee or lessees of said islands a lease, duly executed, in duplicate, not transferable, and taking from the lessee or lessees of said islands a bond, with sufficient sureties, in a sum not less than five hundred thousand dollars, conditional for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject matter of taking fur-seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith. And in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance, and education of the natives thereof. The said lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue officer for the time being who may be in charge at the said islands as the authority of the party for landing and taking skins.

Sec. 5. AND BE IT FURTHER ENACTED, That at the expiration of said term of twenty years, or on surrender or forfeiture of any lease, other leases may be made in manner as aforesaid, for other terms of twenty years; but no persons other than American citizens shall be permitted, by lease or otherwise, to occupy said islands, or either of them, for the purpose of taking the skins of fur-seals therefrom, nor shall any foreign vessel be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited if the same be held or operated for the use, benefit, or advantage, directly or indirectly, of any person or persons other than American citizens. Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give, or dispose of any distilled spirits or



spirituous liquors on either of said islands to any of the natives thereof, such person not being a physician and furnishing the same for use as medicine; and any person who shall kill any fur-seal on either of said islands, or in waters adjacent thereto, without authority of the lessees thereof, and any person who shall molest, disturb, or interfere with said lessees, or either of them, or their agents or employees in the lawful prosecution of their business, under the provisions of this act, shall be deemed guilty of a misdemeanor, and shall for each offence, on conviction thereof, be punished in the same way and by like penalties as prescribed in the second section of this act; and all vessels, their tackle, apparel, appurtenances, and cargo, whose crews shall be found engaged in any violation of either of the provisions of this section, shall be forfeited to the United States; and if any person or company, under any lease herein authorized, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then said person or company shall forfeit the value of the same. And it shall be the duty of any revenue officer, officially acting as such on either of said islands, to seize and destroy any distilled spirits or spirituous liquors found thereon: PROVIDED, That such officer shall make detailed report of his doings to the collector of the port.

Sec. 6. AND BE IT FURTHER ENACTED, That the annual rental to be reserved by said lease shall not be less than fifty thousand dollars per annum, to be secured by deposit of United States bonds to that amount, and in addition thereto a revenue tax or duty

of two dollars is hereby laid upon each fur-seal skin taken and shipped from said islands, during the continuance of such lease, to be paid into the treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same, for the comfort, maintenance, education, and protection of the natives of said islands, and also for carrying into full effect all the provisions of this act:

PROVIDED FURTHER, That the Secretary of the Treasury may terminate any lease given to any person, company, or corporation on full and satisfactory proof of the violation of any of the provisions of this act or the rules and regulations established by him: PROVIDED FURTHER, That the Secretary of the Treasury is hereby authorized to deliver to the owners the fur-seal skins now stored on the islands, on the payment of one dollar for each of said skins taken and shipped away by said owners.

Sec. 7. AND BE IT FURTHER ENACTED, That the provisions of the seventh and eighth sections of "An Act to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia to establish a collection district therein, and for other purposes," approved July twenty-seven, eighteen hundred and sixty-eight, shall be deemed to apply to this act; and all prosecutions for offences committed against the provisions of this act, and all other proceedings had because of the violations of the provisions of this act, and which are authorized by said act above mentioned, shall be in accordance with the provisions thereof; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 8. AND BE IT FURTHER ENACTED, That the Congress may at any time hereafter alter, amend, or repeal this act.

Approved, July 1, 1870.

### CHAPTER THREE.

#### Provisions Relating to the Unorganized Territory of Alaska.

##### SEC.

1954 Customs, &c., laws extended to Alaska.

1955 Importation of fire-arms and distilled spirits may be prohibited.

1956 Killing of fur-bearing animals prohibited.

1957 What courts to have jurisdiction of offences.

1958 Remission of fines, &c.

1959 Saint Paul and Saint George islands declared special reservations.

1960 Killing of seal upon them prohibited except in certain months.

1961 Killing of certain seal prohibited. \*

1962 Limit to number of seals to be killed.

1963 Right to take seal may be leased.

1964 Bond.

1965 Who may lease.

1966 Covenants in lease.

1967 Penalty.

1968 Penalty upon lessees.

1969 Tax upon seal skins.

1970 Lease may be terminated.

1971 Lessees to furnish copies to masters of their vessels.

1972 Certain sections may be altered.

1973 Agents and assistants to manage seal fisheries.

1974 Their pay, &c.

1975 Not to be interested in right to take seals.

1976 Agents may administer certain oaths and take testimony.

Sec. 1954. The laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto.

Sec. 1955. The President shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska. The exportation of the same from any other port or place in the United States, when destined to any port or place in that Territory, and all such arms, ammunition and distilled spirits exported or attempted to be exported from any port or place in the United States and destined for such Territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition and distilled spirits landed or attempted to be landed or used at any port or place in the Territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds four hundred dollars the vessel upon which the same is found, or from which they have been landed, together with her tackle, apparel and furniture and cargo, shall be forfeited; and any person willfully violating such regulations shall be fined not more than five hundred dollars, or imprisoned not more than six months. Bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board fire-arms, ammunition or distilled spirits, when such vessel is destined

to any place in the Territory, or if not so destined, when there is reasonable ground of suspicion that such articles are intended to be landed therein in violation of the law; and similar bonds may also be required on the landing of any such articles in the Territory from the person to whom the same may be consigned.

Sec. 1956. No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof, and every person guilty thereof, shall, for each offense, be fined not less than two hundred nor more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited; but the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable, or other fur-bearing animal, except fur-seals, under such regulation as he may prescribe; and it shall be the duty of the secretary to prevent the killing of any fur-seal and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.

Sec. 1957. Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within the limits of the same, shall be prosecuted in any district court of the United States in California or Oregon, or in the district courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties, or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one

of such courts; and such courts shall have original jurisdiction, and may take cognizance of all cases arising under this act and the several laws hereby extended over the Territory, and shall proceed therein in the same manner and with the like effect as if such cases had arisen within the district or Territory where the proceedings are brought.

Sec. 1958. In all cases of fine, penalty, or forfeiture, embraced in the act approved March 3, 1797, ch. 13, or mentioned in any act in addition to or amendatory of such act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized, if in his opinion, the fine, penalty, or forfeiture was incurred without willful negligence or intention of fraud, to ascertain the facts in such manner and under such regulations as he may deem proper without regard to the provisions of the act above referred to, and upon the facts so to be ascertained, he may exercise all the power of remission conferred upon him by that act, as fully as he might have done had such facts been ascertained under and according to the provisions of that act.

Sec. 1959. The islands of Saint Paul and Saint George, in Alaska, are declared a special reservation for Government purposes; and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury; and any person found on either of those islands contrary to the provisions hereof shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect.

Sec. 1960. It shall be unlawful to kill any fur seal upon the Islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September and October in

each year; and it shall be unlawful to kill such sea at any time by the use of fire-arms, or by other means tending to drive the seals away from those islands; but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury.

Sec. 1961. It shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to the Islands of Saint Paul and Saint George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offense by a fine of not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment not more than six months, or by both such fine and imprisonment; and all vessels, their tackle, apparel and furniture, whose crews are found engaged in the violation of either this or the preceding section shall be forfeited to the United States.

Sec. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals, which may be killed for their skins upon the Island of Saint Paul, is limited to seventy-five thousand per annum; and the number of fur seals, which may be killed for their skins upon the Island of Saint George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for



the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

Sec. 1963. When the lease heretofore made by the Secretary of the Treasury to "The Alaska Commercial Company" of the right to engage in taking fur seals on the Islands of Saint Paul and Saint George, pursuant to the Act of July 1, 1870, Chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seal for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable.

Sec. 1964. The Secretary of the Treasury shall take from the lessees of such islands in all cases a bond, with securities, in a sum not less than five hundred thousand dollars, conditioned for the faithful observance of all the laws and requirements of Congress, and the regulations of the Secretary of the Treasury, touching the taking of fur seals and the disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith.

Sec. 1965. No persons other than American citizens shall be permitted, by lease or otherwise, to occupy the Islands of Saint Paul and Saint George, or either of them, for the purpose of taking the skins of fur seals therefrom, nor shall any foreign vessels be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited, if the same be held or operated for the use, benefit or advantage, directly or indirectly, of any persons other than American citizens.

Sec. 1966. Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give or dispose of any distilled spirits or spirituous liquors on either of those islands to any of the natives thereof, such person not being a physician and furnishing the same for use as medicine; and every revenue officer, officially acting as such on either of the islands, shall seize and destroy any distilled or spirituous liquors found thereon; but such officer shall make detailed reports of his doings in that matter to the collector of the port.

Sec. 1967. Every person who kills any fur-seal on either of those islands, or in the waters adjacent thereto, without authority of the lessees thereof, and every person who molests, disturbs, or interferes with the lessees or either of them, or their agents or employes, in the lawful prosecution of their business, under the provisions of this chapter, shall for each offence be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty-eight, inclusive, shall be forfeited to the United States.

Sec. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

Sec. 1969. In addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur-seal skin taken and shipped from the islands of Saint Paul and Saint George, during the continuance of any lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is empowered to make all needful regulations for the collection and payment of the same, and to secure the comfort, maintenance, education and protection of the natives of those islands, and also to carry into full effect all the provisions of this chapter except as otherwise prescribed.

Sec. 1970. The Secretary of the Treasury may terminate any lease given to any person, company or corporation, on full and satisfactory proof of the violation of any of the provisions of this chapter or the regulations established by him.

Sec. 1971. The lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue-officer for the time being who may be in charge at the islands as the authority of the party for landing and taking skins.

Sec. 1972. Congress may at any time hereafter alter, amend, or repeal sections from nineteen hundred and sixty to nineteen hundred and seventy-one, both inclusive, of this chapter.

Sec. 1973. The Secretary of the Treasury is authorized to appoint one agent and three assistant agents, who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury.

Sec. 1974. The agent shall receive the sum of ten dollars each day, one assistant agent the sum of eight dollars each day, and two assistant agents the sum of six dollars each day while so employed; and they shall also be allowed their necessary traveling expenses in going to and returning from Alaska, for which expenses vouchers shall be presented to the proper accounting officers of the Treasury, and such expenses shall not exceed in the aggregate six hundred dollars each in any one year.

Sec. 1975. Such agents shall never be interested, directly or indirectly, in any lease of the right to take seals, nor in any proceeds or profits thereof, either as owner, agent, partner, or otherwise.

Sec. 1976. Such agents are empowered to administer oaths in all cases relating to the service of the United States, and to take testimony in Alaska for the use of the Government in any matter concerning the public revenues.

## CHAPTER 64.

AN ACT to amend the act entitled "An Act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the act entitled "An Act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy, is hereby amended so as to authorize the Secretary of the Treasury, and he is hereby authorized, to designate the months in which fur-seals may be taken for their skins on the islands of Saint Paul and Saint George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively.

Approved March 24, 1874.

# **In the Supreme Court of the United States.**

OCTOBER TERM, 1897.

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THE NORTH AMERICAN COMMERCIAL Company, plaintiff in error,	}	No. 431.
<i>v.</i>		
THE UNITED STATES, DEFENDANT IN error.		

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ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT.

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## **BRIEF FOR THE UNITED STATES.**

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### **STATEMENT.**

This suit comes originally from the circuit court of the United States for the southern district of New York. It is an action brought by the United States of America against the North American Commercial Company, now the plaintiff in error, to recover the sum of \$132,187.50, with interest thereon from April 1, 1894, which amount, it is alleged by the complaint, was due from the North

American Commercial Company, the defendant, to the United States for rent reserved under a so-called lease, bearing date March 12, 1890, made by the Secretary of the Treasury to the defendant, and for royalties upon 7,500 seal skins taken and shipped by the defendant under the terms of said so-called lease, and for revenue tax at \$2 each on the same number of fur-seal skins taken and shipped by the defendant. The case was tried before the judge in said circuit court without a jury, pursuant to sections 649 and 700 of the Revised Statutes. The court found for the plaintiff, and ordered judgment to be entered in their favor for \$107,257.29, principal, interest, and costs, and judgment was entered June 13, 1896.

The defendant having taken a writ of error to the circuit court of appeals for the second circuit, and the cause having been there argued, that court certified a certain question arising in the cause to this court in order to obtain the instructions of this court for its proper decision. Thereupon, upon the application of the United States, this court made an order that the whole record and cause be sent up to it for consideration, pursuant to the provisions of *section 6 of the act of March 3, 1891*.

A counterclaim of the defendant against the plaintiff for damages for breach of the said lease was disallowed and dismissed by the trial court, but not on the merits thereof, and without prejudice to the right of the defendant to enforce the same by any other proper legal proceeding.

The agreement or lease out of which the cause of action arose is printed as *Appendix A* at the end of this brief.



It is declared to have been made in pursuance of *chapter 3, of Title XXIII, Revised Statutes*. It witnesses that the Secretary of the Treasury leases to the Commercial Company, for a term of twenty years from the 1st day of May, 1890, "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals."

In consideration of the rights secured to it under the lease as above stated the North American Commercial Company on its part covenants and agrees to do the things following, that is to say: (1) To pay to the Treasurer of the United States each year during the said term of twenty years, *as annual rental*, the sum of \$60,000; (2) and in addition thereto agrees to pay the revenue tax, or duty, of \$2 laid upon each fur-seal skin taken and shipped by it from said islands; (3) also to pay to said Treasurer the further sum of \$7.62½ apiece for each and every fur-seal skin taken and shipped from said islands; (4) also to pay the sum of 50 cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years; (5) to secure the prompt payment of the \$60,000 rental above referred to, the company agrees to deposit with the Secretary of the Treasury United States bonds to the amount of \$50,000 face value, to be held as a guaranty for the annual payment of said \$60,000 rental; (6) to furnish to the native inhabitants of said islands annually such quantity or number of dried salmon, and such quantity of salt, and such number of salt barrels

for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine; (7) to furnish to said inhabitants 80 tons of coal annually, and a sufficient number of comfortable dwellings; to keep said dwellings in repair; to provide and keep in repair necessary schoolhouses, and to establish and maintain schools for the education of children; and to the satisfaction of the Secretary of the Treasury—together with other miscellaneous provisions relating to the internal economy of the islands.

The lease further provided as follows:

The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the 1st day of April, 1891.

The company also agrees to employ the native inhabitants of the islands to perform such labor upon the islands as they are fitted for.

The company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and all matters pertaining to said islands and the taking of seals within the possession of the United States; and to obey and abide by any restrictions and limitations upon the right to kill seals, that the Secretary of the Treasury shall judge necessary under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The claim of the Government may be tabulated as follows:

Annual rental.....	\$60,000.00
Revenue tax, 7,500 fur-seal skins taken and shipped, at \$2.....	15,000.00
7,500 fur-seal skips, at \$7.62½ apiece.....	57,187.50
Total.....	132,187.50

Upon this sum interest was claimed from April 1, 1894.

The islands of St. Paul and St. George became a part of the territory of the United States by cession from Russia in 1868. By an act passed July 1, 1870, *Ch. 189 (16 Stat., 180)*, entitled "*An act to prevent the extermination of fur-bearing animals in Alaska*," the times and manner of taking and killing various fur-bearing animals in the Territory of Alaska were regulated and defined. The act relates more especially to seals, although various other fur-bearing animals are specifically mentioned. The act directed that the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, and the right to send a vessel or vessels to said islands for the skin of such seals, should be leased to proper and responsible parties by the Secretary\* of the Treasury for a period of not less than twenty years. The islands were made a Government reservation, and strict provisions were enacted to secure to the lessee the rights made the subject of the lease, as well as to preserve the fur-seal fishery. In 1874 this act and certain earlier statutes were incorporated into the Revised Statutes, as *chapter 3 of Title XXIII, sections 1954-1976*.

The first lease was made under the act of July 1, 1870, to the Alaska Commercial Company, and was dated as

of May 1, 1870. Its term was twenty years. That lease having expired, the present lease, dated May 1, 1890, was made to the plaintiff in error.

The sixth finding of fact by the trial court states the nature and habit of the herd of seals which resort to these islands annually. (Rec., p. 23.)

The evidence discloses that prior to 1890 the number of seals annually resorting to these islands was rapidly diminishing. This, as is well known, was attributed to the open sea or pelagic sealing, whereby the seals, especially the females, who were exempt from slaughter under the laws of the United States, were intercepted on their passage to the islands by the crews of foreign vessels and killed in great numbers while in the water. During the first year, under the present lease, the plaintiff in error was able to secure only 21,000 skins of the proper character. (Evidence of Charles J. Goff, Rec., p. 82.)

For several years prior to 1890 the United States, asserting that it had territorial jurisdiction over Bering Sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters of that sea. It had become evident that if the seal fishery was to be preserved, some regulations of an international character must be made. Open-sea sealing was largely carried on by Canadian vessels sailing from ports of British Columbia, or by American vessels sailing under the British flag from those ports. Great Britain denied the territorial jurisdiction of the United States over Bering Sea, and denied that the United States had a right of property in the fur seals when on the high seas during their

progress to or from the islands of St. Paul and St. George.

It became necessary, therefore, to resort to international regulation to prevent the extermination of the seals pending the dispute between Great Britain and the United States upon this subject. The Treasury agent in charge made a report to the Secretary of the Treasury after the season of 1890, in which he strenuously urged the necessity of prohibiting sealing absolutely for a number of years upon the islands as a necessary measure for the preservation of the seals. (Plaintiff's Exhibit 41, Rec., pp. 166, 172.)

In consequence of these representations and of the rapid diminution of the number of fur seals on the islands, an agreement was entered into with Great Britain known as a *modus vivendi*, which was proclaimed by the President on June 15, 1891. By this agreement the President, on behalf of the United States, agreed to prohibit the killing of fur seals by citizens of the United States in Bering Sea and upon the islands of St. Paul and St. George, except 7,500 to be taken on the islands for the subsistence and care of the natives. Great Britain on its part agreed to prohibit fur sealing by subjects of Great Britain in Bering Sea during the continuance of the *modus*. (27 St. L., 980.)

The purpose of this agreement is in the preamble stated to be the avoidance of irritating differences and to promote the friendly settlement of the questions pending between the two Governments touching their respective rights in Bering Sea, and *for the preservation of the*

*seal species.* The prohibition contained in this agreement was to continue until May, 1892.

The differences between the two Governments had not been adjusted by the first of May, 1892, but by a convention proclaimed May 9, 1892, the two Governments agreed to arbitrate their differences in Bering Sea arising out of the efforts of the United States to preserve the fur seals.

By the latter agreement the United States Government agreed to prohibit seal killing during the pendency of the arbitration in Bering Sea and on the shores of the islands thereof, the property of the United States, in excess of 7,500, to be taken on the islands for the subsistence of the natives. This prohibition continued until the fall of 1893 and covered the killing period of the year for which recovery is sought in this case.

This last convention was ratified by the Senate of the United States April 19, 1892. This agreement is in the preamble said to be intended as a "*restrictive regulation for seal hunting.*"

The findings of the trial court as to the taking of seals by the defendant during the year 1893 are as follows:

Tenth. That, pursuant to such agreement, the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.

Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred upon him by section 1962 of the Revised Statutes, to limit the right of killing seals when necessary for the preser-

vation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7,500, specified in the said *modus vivendi*.

Twelfth. That in the year 1893 the United States Government itself, through the agents of the Treasury Department, took upon the said islands 7,500 seals; that the said defendant was permitted to co-operate in selecting the seals so killed, and to take, and it did take and retain, the skins of those seals, and in this way, and in this way only, the defendant received those 7,500 skins.

In accordance with the power reserved to him in said contract, the Secretary of the Treasury, at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George, to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of \$3,750. (Rec.,\*p. 24.)

The court also found as a conclusion of law that the defendant, having received the said 7,500 seal skins taken from the islands during the year 1893, is liable to pay the plaintiff therefor the sum of \$94,687.50, with interest thereon from the 1st day of April, 1894; and the plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the defendant.



## CONTENTIONS OF THE PLAINTIFF IN ERROR.

On behalf of the plaintiff in error it is claimed :

1. That the provision contained in section 1962, Revised Statutes, as follows :

But the Secretary of the Treasury may limit the right of killing if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper,

applies to the lease of the plaintiff in error, although it was made after the expiration of the period of twenty years from July 1, 1870, mentioned in said section, and that therefore, if the 7,500 skins actually received and shipped by the plaintiff in error during the year 1893 are to be considered as taken under the lease, the United States can recover rent only in the proportion that 7,500 bears to 100,000, and the rental should be reduced accordingly; and the plaintiff in error claims that this reduction applies not only to the specific annual rental of \$60,000, but also to the per capita sum of \$7.62½ for each and every seal taken, etc. Computed according to this rule, the amount due to the United States would be \$23,789.50, which sum the plaintiff in error tendered to the United States before action was brought.

2. That the *modus vivendi* operated as a total suspension of the benefits of the lease, and relieved the defendant from the covenants for the payment of rent and royalty, and therefore that the complaint should have been dismissed.

3. By way of counterclaim, the plaintiff in error contends that it could have taken during the season of 1893

20,000 fur-bearing seals without unreasonable injury to or diminution of the herd, but that being limited by the terms of the treaty to 7,500 seals, the lessee was damaged to the extent of \$283,725.

STATEMENT OF THE STATUTES AS THEY WERE MAY 1,  
1890.

I desire, at the outset, to call attention to the actual state of the laws governing the subject under discussion at the time this lease was made.

It is comprised in sections 1956 to 1976, Revised Statutes, and an amendment approved March 24, 1874.

The act approved July 1, 1870, which was entitled, "An act to prevent the extermination of fur-bearing animals in Alaska," had been incorporated into the Revised Statutes, and was no longer in force as a distinct statute.

It will be perceived, on a perusal of the act of 1870, and of the Revised Statutes, sections 1956 to 1976, that the object the Government had in view was the preservation by proper regulation of the fur-bearing animals of Alaska, including seals, but not seals exclusively.

The Islands of St. Paul and St. George are, by section 1959, made a special reservation for *Government purposes*, and it is declared unlawful for any person even to land on either island, except by authority of the Secretary of the Treasury.

Section 1960 forbade killing of fur-bearing seals on these islands except during June, July, September, and October in each year.

It also forbade killing seals by use of firearms, or by other means tending to drive the seals away from those islands.

Section 1961 forbade the killing of female seals or any seal less than one year old; also the killing of seals in the water, or on the beaches, cliffs, or rocks where they haul up to remain.

Section 1962 fixes the maximum number which may be killed for their skins on each island *for the period of twenty years from July 1, 1870.*

Section 1963 provides that when the outstanding lease to the Alaska Commercial Company expires, or is surrendered, forfeited, or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government and the protection of the fisheries, *the right of taking fur seals on said islands and of sending a vessel or vessels to the islands for the skins of such seals* for the term of twenty years, at an annual rental of not less than \$50,000.

The act of March 24, 1874, amends, in effect, the Revised Statutes in the following particulars:

1. By section 1960 the months of June, July, September, and October were designated as the months in which fur seals might be taken on the islands for their skins.

The amendment authorizes the Secretary of the Treasury to designate the months in which fur seals may be taken for their skins on the islands and in the waters adjacent thereto.

2. By section 1962 the maximum number which might be killed upon the island of St. Paul was limited to 75,000 per annum, and upon the island of St. George it was 25,000 per annum.

The act of March 24, 1874, authorizes the Secretary of the Treasury to designate the number to be taken on and about each island respectively.

Thus Congress substituted the discretion of the Secretary of the Treasury for its own previously fixed judgment, in two particulars: first, the months in which seals might be killed; secondly, the number that might be killed on each island, respectively.

It is to be observed that in the latter particular the Secretary was left without any limitation whatever. He could authorize the taking of more than an aggregate of 100,000 seals from the two islands, or he could authorize the taking of a less number than 100,000 in the aggregate. He could also authorize more or less than 75,000 for St. Paul and more or less than 25,000 for St. George. In a word, the times of killing and both the maximum and minimum number to be killed were left to the judgment of the Secretary.

This appears to be the plain, natural, reasonable meaning of this legislation. The meaning of it is so clear and free from doubt that any person dealing with the Secretary of the Treasury upon this subject under these statutes should be expected to count upon exactly that, and no other construction.

## EXAMINATION OF THE LEASE.

This, then, being the state of the law, let us examine the lease which the plaintiff in error took. The learned counsel for the plaintiff in error, referring to the making of the present lease, asserts (Brief, p. 5):

When the right was again put up, everyone, of course, supposed that the maximum was the same, and subject to the same discretion in the Secretary.

There is not the slightest evidence in the case to show what anyone *supposed* with reference to the law in the case. The only presumption is that everyone supposed the law to be exactly what the law plainly declared; but since the learned counsel has referred to the announcement made at the time of the bidding, and since the call for bids and the bids of the defendant company have been put in evidence, it is proper to refer to them to see if we can infer from anything which is a matter of record what the parties really did suppose.

The advertisement contains this provision (Ex. 1, Rec., p. 84):

The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to 60,000, and for the succeeding years the number will be determined by the Secretary of the Treasury in accordance with the provisions of law.

The plaintiff in error put in three bids, Nos. 10, 11, and 12. (Rec., p. 101, etc.) Each bid offered a gross sum as rental and a *per capita* royalty in addition to the revenue tax. Bids Nos. 10 and 12 were higher in the *per capita* royalty offered than bid No. 11, but bid

No. 10 contained a proviso that it was conditional on a guaranty by the United States that the bidder should be allowed to take 100,000 seals in each and every year of the lease without reduction by the Secretary. Bid No. 12 was conditioned on the express proviso that the United States should prevent all seal hunting in Bering Sea. Bid No. 11 (Rec., p. 105) was absolute, containing no conditions whatever. The latter was the one accepted by the Government. This bid recited the advertisement of the Secretary at length. It is important to observe that the plaintiff in error, in making its several bids, desired to discriminate between a lease which would allow the taking of 100,000 seals in each year without reduction, a lease which would be conditioned on the prevention of all seal hunting in Bering Sea, and such a lease as was called for by the advertisement.

Of course, no matter what the language of the advertisement for the bids, if the lease is plain and unambiguous, the bids and advertisements can not be resorted to in order to give a different meaning to its language.

It is submitted that the language of the lease is clear, unambiguous, and without any uncertainty which justifies resort to extraneous evidence in order to interpret it.

With reference to the lease, it is to be observed that it takes effect after the expiration of the twenty years mentioned in Revised Statutes, 1962. That period expired July 1, 1890, and the right to kill under the new lease began on the expiration of the old lease.

What was leased?

The exclusive right to engage in the business of taking fur seals on the islands of St. George and

St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

What did the company undertake?

First. To pay to the Treasurer of the United States each year during said term of twenty years as annual rental the sum of \$60,000, and in addition thereto to pay the revenue tax or duty of \$2 laid upon each fur-seal skin taken and shipped by it from said islands, and also to pay the further sum of \$7.62½ apiece for each and every fur-seal skin taken and shipped from said islands.

Second. Faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury had theretofore or might thereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands, and the taking of seals within the possessions of the United States.

Third. To obey and abide by any restrictions and limitations upon the right to kill seals that the Secretary of the Treasury should adjudge necessary under the law for the preservation of the seal fisheries of the United States.

Fourth. That it would not kill, or permit to be killed, so far as it could prevent, in any year, a greater number of seals than should be authorized by the Secretary of the Treasury.

The lease fixed the number of fur seals to be killed for their skins during the year ending May 1, 1891, the first year of the lease, at a maximum of 60,000.

This was only a method of fixing, at the date of the lease, the number that might be killed for the first year. For the succeeding years the number was to be regulated



by the Secretary of the Treasury, as provided by the act of March 24, 1874.

So that the very covenants of the lease were made to conform to the interpretation which the Government puts upon the act of March 24, 1874, namely, that the lessee should not kill in any year a greater number of seals than should be *authorized* by the Secretary of the Treasury.

*Argument.*

FIRST POINT.

SECTION 1962, REVISED STATUTES, HAS NO APPLICATION TO THE CONTRACT OF THE PLAINTIFF IN ERROR. THE PROVISIONS OF THAT SECTION EXPIRED WITH THE TERMINATION OF THE PERIOD OF TWENTY YEARS THEREIN MENTIONED.

The argument of the learned counsel of the plaintiff in error, by which he attempts to sustain the opposite construction, rests upon a series of violent false assumptions:

1. He contends that the contract is a lease of the right to take "the annual seal product" of the Pribilof Islands, and that this was a "right of property," vested in the United States and by them transferred under the contract to the Commercial Company.

In reply to this, I contend that the language of the statutes and the language of the lease show that what was granted was a *mere license*—a license to hunt or fish, "*to take fur seals;*" a license to land on the islands and to send a vessel or vessels there.

The language of the lease is—

*the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, and to send a vessel or vessels to said islands for the skins of such seals.*

It requires neither argument nor citation of authority to prove that a grant of a right to fish, or to hunt, conveys no property in the fishes or animals to be taken until they actually are taken and reduced to possession.

The right granted is the right *to take*, not property in the wild things that are the subject of the pursuit.

The right to take was limited; for instance, to take only at certain times and in a certain way. The lessee could not take a single seal in the water. It could take no females, nor any seals less than two years old. Neither Congress nor any other authority has ever declared the seals of the Pribilof Islands to be a domestic herd.

The statute (Rev. Stats., sec. 1963), referring to the sealing privileges, speaks of "the fisheries." It was an industry—a valuable one—but only in the same way that the shad fisheries of the Atlantic coast rivers are valuable.

There is not a word in the statute or the lease indicative of any purpose to treat the seal herd as domesticated property; not a single reference to the annual product. From beginning to end it refers only to "the right to kill" as a license or privilege, and not as a grant of property in the herd.

These rights are constantly referred to in the proceedings, and in the award of the Tribunal of Arbitration, known as the Fur-seal Arbitration, as seal fisheries. The

claim was made by counsel for this Government before that commission, that the United States had a right of protection or property in the fur seals of the Pribilof Islands. The present counsel for the plaintiff in error argued that claim with great ability before the commission. The commission, however, took the other view, and decided that the United States had not any right of protection or property in the seal herd.

Of course the United States could not be bound by a claim of this kind made by its counsel in a case with another nation, especially as the claim so made was there disallowed.

(2) Having attempted to establish the position that the seal herd was property, although not reduced to possession, counsel then propounds another erroneous proposition. He asserts (Brief, p. 25) that the right leased was a right to take the annual product limited by *law* to 100,000.

No such right ever existed under either lease. The statute never mentioned a maximum of 100,000. It did fix for a period of twenty years, expiring July 1, 1890, a maximum limit of 75,000 per annum for St. Paul and 25,000 for St. George, which is a very different thing from "limiting the annual product of the islands to 100,000."

(3) Counsel for the lessee, in the development of his argument, makes this further erroneous statement (Brief, p. 28):

By the act of 1870 one scheme of leasing was established and made applicable alike to the first and every subsequent lease. Every provision of

this act was reenacted by the Revised Statutes, and no new ones were added. It is equally clear that the two pieces of legislation were intended to be, and in fact are, the same; and the present lease is consequently of the same right, with all its incidents, as that of the first lease.

It is unnecessary to follow the line of reasoning of the defendant in the effort to support this contention. Undoubtedly the Revised Statutes were intended to reenact substantially the act of 1870, and undoubtedly they did so.

The vital fault in the argument for the defendant is that it ignores the most important circumstance of all, namely, that whether we refer to the act of 1870 or to the Revised Statutes, *the limitation of a maximum number was expressly made only for a period of twenty years from July 1, 1870.* No possible twisting or contortion of the language of the statutes can get that fact out of the case.

Counsel, on pages 30 and 31, asserts that the contention of the Government involves the assertion that by the Revised Statutes certain "momentous changes" were effected in this scheme of future leases. That is denied on behalf of the United States. The act of 1870 and the Revised Statutes both provided that after July 1, 1890, the limit upon the maximum, and the provisions for a proportionate reduction of rental in case of a modification by the Secretary, should not apply.

The changes were not effected by the Revised Statutes. Whatever difference in the scheme of leasing might exist between a lease made in 1870 and one made in 1890 arose out of the terms of the original act as well as out of the terms of the Revised Statutes.

I am not referring at present to the act of 1874.

Counsel admits (Brief, p. 32) that the limitation of the number to be taken was, in the first instance, in the original act, confined to the period of twenty years. He contends, however, that so far as future leases were concerned it was continued and made applicable to them in explicit language by the terms of section 1968, which corresponds to section 5 of the act of 1870. Thus the learned counsel is contending for the following extraordinary proposition: That by section 1962 a limitation of the number to be taken was created to continue only for twenty years, while by a subsequent section of the same act, passed at the same time, this limitation was extended indefinitely and made applicable to all leases, even such as might run beyond the period of twenty years.

The learned counsel undoubtedly perceived the absurdity of this position, for he suggests (Brief, p. 35) that it would naturally be asked what the purpose of Congress was in confining the limitation of the fixed maximum to a period of twenty years.

His answer to this question is certainly not an instance of lucid explanation.

His failure to answer it warrants me in repeating the question: What was the purpose of Congress in confining the limitation of the fixed maximum to a period of twenty years? It is not necessary to ask what the purpose of Congress was; the question is, did Congress clearly make such a limitation? To that the answer can be only of one kind.

I agree with the rule of construction quoted by counsel for the plaintiff in error on page 43 of his brief:

An author must be supposed to be consistent with himself; and therefore if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the legislature is treated in the same manner as that of any other author. The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.

It is also a well-known rule of construction that effect must be given, if possible, to all parts of a statute. Such effect is a natural, ordinary, reasonable one, and not a forced or distorted one, if there is an obvious and natural one to be discovered.

Now, the argument of the learned counsel for the plaintiff in error would utterly destroy that provision of this legislation which refers to the period of twenty years from July 1, 1870. If his construction is correct, Congress ought not to have used those words or referred to that date. According to his argument, Congress had it in mind when it was considering section 1962 to limit the maximum to a period of twenty years, but a few moments later, when they got to section 1968, they changed their purpose and determined to extend the limitation indefinitely; and yet they passed the act without striking out the former provision.

#### WHAT IS THE CONSTRUCTION OF SECTION 1968?

If it can have a construction that is reasonable, and at the same time consistent with and not destructive of the provisions of section 1962, that construction should be placed upon it by the court.

The section reads as follows:

If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or in case the same have been disposed of, then such person or company shall forfeit the value of the same.

It is transcribed from the latter part of section 5 of the act of 1870.

The words "in this act prescribed" were originally used in the act of 1870, and were copied in the same form into the Revised Statutes. So, also, were the words "under any lease herein authorized."

Originally, therefore, this lease was intended to put a forfeiture upon persons violating the lawful limitation.

It was continued in the same language in the Revised Statutes, and was doubtless intended to apply to the lease then pending as "a lease therein authorized."

It had, however, up to the 1st of July, 1890, an active, valuable, and sufficient purpose.

By section 1963 it was directed that when the lease to the Alaska Company or any future similar lease should expire, or be surrendered, or forfeited, or terminated, the



Secretary should make a new lease. If, therefore, the lease of the Alaska Company had been surrendered, or forfeited, or terminated at any time before July 1, 1890, it would have been incumbent on the Secretary to relet. The lessee under the new lease would have been subject to the limitation of section 1962 for the balance of the period of twenty years, and the Secretary of the Treasury would have been subject also to that limitation. It therefore was entirely reasonable and proper to provide for a forfeiture against any new lessee who might come in under a lease made upon the happening of the contingency provided for by section 1963. If this construction is not correct, then in case the Alaska Company's lease had been surrendered, or declared terminated in accordance with the power reserved to the Secretary of the Treasury, on the first of July, 1873, there would have been no law to enforce a forfeiture of the skins against any lessee who killed an excess of 75,000 in any one year upon the island of St. Paul, or an excess of 25,000 on the island of St. George.

A lease made under the circumstances above supposed would have been a lease "herein authorized."

There was a number for each island prescribed in that chapter, but prescribed for only twenty years.

Such a construction as this renders the whole law entirely clear and harmonious, while the opposite contention makes it necessary to strike out one of the most obvious provisions contained in it.

## SECOND POINT.

## EFFECT OF THE ACT OF MARCH 24, 1874.

It is profitless to discuss the effect of this act upon the lease to the Alaska Company.

Section 1972 reserved to Congress the right at any time to alter, amend, or repeal sections from 1960 to 1971, and it may very well be urged on behalf of the United States that whatever rights the Alaska Commercial Company obtained under its lease were subject to modification by subsequent legislation.

There can be no question, however, that when the present lease was made it was made subject to the Revised Statutes as amended by the act of March 24, 1874.

I have heretofore pointed out that the act of 1874 amends the Revised Statutes in two particulars: First, by authorizing the Secretary of the Treasury to designate the months in which seals may be taken for their skins; second, by authorizing the Secretary to designate the number to be taken on and about each island, respectively.

This was a substitution of the discretion of the Secretary for its own previously fixed declaration in these two particulars.

The Government does not claim, as is said by the counsel for the plaintiff in error, that the act of 1874 abrogated the whole system of leasing. There never was any such system of leasing as counsel contends for in his brief. What the act of 1874 did was to amend the law. An amendment is of no use unless it effects some change in the law.

Counsel says (Brief, p. 41):

The act of itself changed nothing; but when the authority given by it was exercised, the change was effected.

The act did change something. It changed the law, and that is what it was passed to do. It gave authority to the Secretary of the Treasury—authority which he had not previously possessed. It was a grant of power—a conferring of discretion, the designation of the person who, in behalf of the Government, should from time to time regulate the times and seasons of killing and number of seals to be killed.

This statement of the purpose of Congress disposes of the contention that when the Secretary had once exercised his authority under the act of 1874 he had exhausted it, and that his designation then became the permanent, arbitrary, general designation.

It is insisted that the reasonable construction of this act is that he had a continuing discretionary authority.

As a matter of fact, he twice modified the respective numbers permitted to be killed by the Alaska Company under its lease. (Rec. p. 135.)

The lease contains a covenant that the lessee will not kill in any year a greater number of seals than is authorized by the Secretary, thus expressly recognizing the Secretary's power to fix the number.

From the nature of the act concerning which the Secretary was to exercise discretion, it is obvious that its repeated exercise is necessary to accomplish the legislative purpose. The original act recognized that it might be desirable for the preservation of the seal industry to

modify the number to be killed in different years. The act of 1874 put this discretion fully in the Secretary. It was essential that he should have the power to adapt his orders to the circumstances of each succeeding year. The passage of the act of 1874 was a declaration by Congress that the establishment of a fixed number by statute for even so brief a period as twenty years was unwise; that the conditions affecting such a subject as the possible yield of a fishery were too uncertain to be governed by the rigid provisions of a statute. The very nature of the subject-matter shows that it was the purpose of Congress that this power vested in the Secretary should be a permanent one, to be exercised from time to time as he deemed advisable.

It is a confusion of ideas to say, as is said in the brief of the learned counsel, that Congress intended that whatever effect the act should have, it should immediately have. Unquestionably, as a mere statement, that is true, *but the effect of the act was not to vary the maximum, but to confer authority on the Secretary, and, of course, it had that effect as soon as approved.*

#### THIRD POINT.

THERE HAS BEEN NO DEPARTMENTAL CONSTRUCTION OF THIS LEGISLATION WHICH IS BINDING OR EVEN INFLUENTIAL UPON THE COURT.

It is only in doubtful cases and where the action is on its face in accordance with the statute that the courts will adopt a departmental construction of a statute. (*United States v. Tanner*, 147 U. S., 661.)

It has been proved that the claim of the Government under the lease during the years 1891 and 1892, in which the *modus vivendi* was in operation, and even for the year 1890, prior to the *modus vivendi*, was adjusted with the lessee by Mr. Secretary Foster. In 1890 the lessee took about 21,000 seals. The evidence of the Government agent, Mr. Goff, shows that it was the utmost number they could take of merchantable skins.

The lessee certainly took all the risk of a catch reduced by natural causes. If from natural causes it had not been able to get a single merchantable skin in any year of its lease, it would have been bound nevertheless to pay the annual rental of \$60,000. It is hard to see, therefore, what lawful right the Secretary had to make any abatement of rent, at least for the year 1890. He did, however, abate the rent for that year. He took the position that the annual rental of \$60,000 was subject to abatement in the proportion of the number taken to an annual catch of 100,000. But he held in that year that the *per capita* royalty and revenue tax were not subject to abatement. He settled with the lessee for the year 1890, charging the whole *per capita* royalty and revenue tax on 20,995 skins actually taken and shipped, and a rental of 60 cents per skin for the same amount; in all, \$214,673.88. According to the testimony, the gross price received for these skins by the lessee in the London market was 146 shillings apiece, something over \$757,000.

For 1891-92 the Secretary settled with the lessee on a different basis. He treated both the rental and the *per capita* royalty as subject to abatement. In 1891 the

lessee obtained 13,482 seal skins, for which it received in the London market \$404,000. The claim of the Government for that year was settled for \$46,749.23.

In the year 1892 the lessee took 7,549 skins, for which, under the lease, the Government was entitled to receive \$132,659.12. The defendant company was allowed to settle upon payment of \$23,972.60. For the skins taken in that year they received in the London market \$227,000.

These constructions varied in different years, so that it is impossible to allege that any one of them furnished a rule of construction. There were conflicting opinions from the Department of Justice: One by Mr. Solicitor-General Taft (20 Op., p. 51); a supplemental opinion by Mr. Taft (20 Op., p. 62); an opinion by Mr. Attorney-General Miller, dated January 17, 1893 (20 Op., p. 51); an opinion by Mr. Solicitor-General Maxwell (20 Op., p. 634); and, finally, one by Mr. Attorney-General Olney (20 Op., p. 732).

#### FOURTH POINT.

IN VIEW OF THE PLAIN MEANING OF THE ACT OF 1874, IT IS NOT PERMISSIBLE TO RESORT TO THE STATEMENTS MADE IN CONGRESS AT THE TIME OF THE PASSAGE OF THAT BILL IN ORDER TO ASCERTAIN THE PURPOSE FOR WHICH IT WAS PASSED.

The citations from the Congressional Record are merely the remarks of individual members of the House and Senate. Assuming that they correctly state the object of the law, its operation would not necessarily be limited to the especial purposes which they declare.

It is submitted, however, that an examination of the reasons given discloses that the reasons given in the House do not correspond with the reasons given in the Senate.

#### FIFTH POINT.

THE CLAIM OF THE UNITED STATES BEFORE THE BERING SEA ARBITRATORS FOR DAMAGES UNDER ARTICLE V OF THE MODUS VIVENDI OF MAY 9, 1892, GIVES NO SUPPORT EITHER AS AN ESTOPPEL OR AS AN ADMISSION AGAINST INTEREST TO THE LESSEE'S CLAIM FOR DAMAGES IN THIS ACTION, OR TO THE CONSTRUCTION OF THE LEASE AND STATUTES FOR WHICH IT CONTENDS.

Article V of the *modus vivendi* of 1892 is as follows:

#### ARTICLE V.

If the result of the arbitration be to affirm the right of the British sealers to take seals in Bering Sea within the bounds claimed by the United States under the purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the arbitration, upon the basis of such a regulated and limited catch or catches as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds; and, on the other hand, if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens, and lessees) for this agreement to limit the



island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds.

The amount awarded, if any, in either case shall be such as under all the circumstances is just and equitable, and shall be promptly paid.

In the course of the Behring Sea arbitration the claim was originally made by the United States for the recovery of the damages which it and the company, its lessee, sustained by reason of this article. Such a claim was presented by the United States in its "case" (pp. 286 to 291). It was claimed that the Government was entitled to such amount as would have been due from the company for the additional take of 30,000 seals over and above the 7,500 that were taken in the year 1892, and it was therefore claimed that its lessee was entitled to the profits on such additional number of skins. Counsel for the plaintiff in error use this demand of the United States as evidence, or as an admission of the fact, that 30,000 additional seals could have been taken. The first answer to this is, of course, that the counsel for the Government expressly admitted that the evidence failed to establish any such fact. In the volume entitled "Argument of the United States," signed by all the counsel, including the counsel for the defendant in this case (vol. 9), at page 216, Mr. Blodgett, one of the counsel for the United States, made this statement:

Frankness requires us, as we think, to say that the proofs which appear in the counter case of the United States as to the condition of the seal herd on

the Pribilof Islands show that the United States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *modus vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the tribunal to the proofs, and submit the question to its decision.

On May 31, 1893, the Honorable Edward J. Phelps announced that the United States would not, on its behalf, ask the tribunal for any finding for damages upon and under article 5 of the convention or *modus vivendi* of 1892. (*Vol. 1 of Proceedings (American edition), p. 34.*)

This is in evidence in the case.

For the purpose of the present action it is still more in point that the case of the United States was required by the treaty of arbitration to be presented, and was in fact presented, before the close of the year 1892, so that the take, or probable take, for 1893 was not brought into question at all under the evidence. The fact that more might possibly have been taken in 1892 does not show that more could have been taken the next year. In fact, however, the urging of this claim by the United States before the Tribunal in no way estops them. It was not between the same parties as in this action, and the officers who presented the case of the United States had no authority to bind the Government for any other purpose than the cause intrusted to them. Their powers and duties are expressed by the statute and clearly did not extend to making an admission estopping the United States in any such proceeding as the present. The right of Government officers to bind the United States by estoppel has

been repeatedly denied by the courts in cases in which it was brought into question, except in so far as the statute expressly authorizes them to bind the United States. (*Carr v. United States*, 8 Otto, 433; *Case v. Terrill*, 11 Wall., 199; *Lee v. Munroe*, 7 Cranch, 366; *Reed v. United States*, 11 Wall., 591; *Finn v. United States*, 123 U. S., 227; *Kinkhead v. United States*, 150 U. S., 483, pp. 495-96.)

The proceedings in respect to this claim really show that the United States acted merely as the agent for its lessee in presenting this claim to the Bering Sea Tribunal. The lessee took the number allowed (7,500) by the Secretary as a quota under the lease, and hoped to get a finding in its favor from the arbitrators entitling it to damages from Great Britain. In the letter of June 27, 1892, from Secretary Foster to Mr. Jeffries (Ex. No. 21, R., p. 140), acknowledging receipt of the money paid in settlement of the catch of 1891, he says:

It is understood that this adjustment is accepted by said company as full settlement and satisfaction of all claims and demands against the United States for whatever cause to the date thereof, except only as to its right to claim any amount which may be awarded to it by the arbitrators appointed by Great Britain and the United States under the treaty of April 18, 1892.

The claim presented by the United States to the Arbitration Tribunal on behalf of the defendant was not presented as a claim which the defendant had against the United States *under the lease*. It involved no question

of the powers of the Secretary in respect to the lessee under the covenants of the lease.

#### SIXTH POINT.

THE CONSTRUCTION OF THE LEASE CAN NOT BE AFFECTED BY CONSIDERATION OF THE HARDSHIP THE LESSEE WILL SUFFER BY ENFORCEMENT OF THE CONTRACT INTO WHICH IT HAS VOLUNTARILY ENTERED.

The contract must be enforced, however severe the enforcement of it may seem to be; but the plaintiff in error really took very little risk in making such a contract. Obviously at the time the lease was made it was supposed that 60,000 could be taken annually. On such a basis the *per capita* royalty was intended to be the principal compensation to the Government. The reservation of this *per capita* royalty made it directly to the interests of the Government to allow the largest possible catch, and the lessee might very naturally trust to such a self-regulating provision as this. This provision by its own operation carried out the spirit of the proviso to section 1962 in respect to reduction of rent.

But, however this may be, it is not at all unusual for a contractor with the State to place himself entirely at the mercy of the public officer who has control of the subject matter. There is a class of contracts frequently before the courts in which the contractor is in just such a position. In almost all contracts now made for great public works the contractor absolutely agrees to abide by the final certificate of the engineer or architect who has charge of the work. The contractor's fortunes are placed

in the hands of this official, and it has frequently been determined by the court that the only restriction upon the powers of the engineer or the architect is that he shall act in good faith. (Opinion of circuit court, R., p. 16.)

Courts can not relieve from possible hardships of contracts. They must regard the sanctity of contracts and enforce performance as agreed. (*Smoot's Case*, 15 Wall., 36; *The Harriman*, 9 Wall., 161.)

Counsel for plaintiff in error insists that his client would never have entered into a contract based upon such a precarious hope as arises from the construction put upon the law by the Government.

It is not unusual for persons to invest capital in risky ventures. Very few persons have the opportunity to bet on a sure thing. Except for the destruction of the herd by the open-sea fishing, the contract of the North American Commercial Company would have been very profitable. It is impossible to say from any evidence in the case that it has not been unprofitable, even under the circumstances that have existed since 1890. The figures previously given as to prices obtained for skins\* sold in London would seem to indicate that the profits were very large. It appears from the evidence (Rec., p. 57) that the amount realized to the company for the catch of 1893 was about \$24 a skin, amounting to \$180,000.

#### SEVENTH POINT.

The trial court found that, pursuant to the *modus vivendi*, the United States prohibited and prevented the

defendant from taking any seals from the island during the year 1893, and thus deprived the defendant of the benefit of its lease. (Rec., p. 24.)

While this is classed as a finding of fact, it is submitted that it is in reality a conclusion of law which the United States have a right to oppose so far as they may be affected by such finding in this case. The limitation imposed by the treaty was a political act of the Government, and hence any loss which the defendant suffered by reason thereof was in the nature of *damnum absque injuria*. Regulation of fisheries is part of the police power of the Government. (*Smith v. Maryland*, 18 How., 71; *Lawton v. Steele*, 152 U. S., 133.) Sovereign powers of government can not be parted with by legislation or contract (*Stone v. Mississippi*, 101 U. S., 814):

In 1867 the legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum in cash, an annual payment of a further sum, and a percentage of receipts from the sale of tickets. A provision of the constitution adopted in 1868 declares that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." *Held*, I. That this provision is not in conflict with sec. 10, art. 1, of the Constitution of the United States, which prohibits a State from "passing a law impairing the obligation of contracts." Such a charter is in legal effect nothing more than a license to enjoy the privilege conferred for the time, and on the terms specified, subject to future legislative or constitutional control or withdrawal.

In the *Sinking-Fund Cases* (99 U. S., 700, 718) it is said :

The United States can not, any more than a State, interfere with private rights, *except for legitimate governmental purposes.*

In the same case, considering the effect that should be given to the power of repeal, alteration, and amendment reserved in the statute relating to the Union Pacific and Central Pacific Railroad companies, it is said :

In the act of 1864, section 22, it is provided "that Congress may at any time alter, amend, and repeal this act." Taking both acts together and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State* (15 Wall., 498), "it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors and for the proper disposition of its assets," and again, in *Holyoke Company v. Lyman* (id., 519), "to protect the rights of the public and of the corporators or to



promote the due administration of the affairs of the corporation."

Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup* (Id., 459), he said, "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company v. Maine* (96 U. S., 510), "by the reservation \* \* \* the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swayne, in *Shields v. Ohio* (95 U. S., 324), says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority.

The Government never parted with, and could not divest itself of, the power to regulate seal fisheries in the interest of the preservation of the species. The lease was taken by the company subject to that inalienable power. If the limitation imposed by the *modus* was in violation of the fair terms of the contract as made by the Secretary of the Treasury (which is denied by the United States), the company might have treated it as broken and have refused to accept any performance whatever and it would not then have been liable to pay the rental. But it did not elect to regard the lease as broken.

It accepted the limitation, and therefore should be deemed to have assented to the exercise of the sovereign power of regulation exercised by the Government by means of the *modus*.

"Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the Constitution." (*Gibson v. United States*, 166 U. S., 269.)

The prohibition by the *modus* was not unreasonable. It was not a hardship on the lessee; it was for its benefit. If the lessee lost \$13,000 or \$20,000 in one year by reason of the prohibition, even if it never in any later year capture those same seals, it was because the Government was trying to preserve something for the future years of the lease—to save the race from extermination.

The Secretary's authorization of the number of seals to be taken in any year was expressed in his instructions to the chief agent of the Government on the islands prior to the departure of the agent for the islands in the spring of the year. These instructions were always communicated by the agent to the lessee. In the season of 1893 the Government supervising agent was Joseph B. Crowley. Instructions were issued to him on April 26, 1893. The lessee's superintendent received, and had in his possession, a copy of the instructions before the commencement of the season of 1893 (Rec., p. 32). The instructions are printed on page 124 of the record.

In a letter from N. L. Jefferies, attorney for the company, dated November 15, 1893, to the Secretary of the Treasury, he says:

During the present year this company, in strict compliance with the orders of the Treasury Department, restricted its catch to 7,500. (Rec., p. 130.)

This clause also occurs in the instructions to Agent Crowley:

This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interest and those of the Government in the preservation of the fur-seal industry being identical.

These instructions show conclusively that the Secretary of the Treasury considered that 7,500 skins should be taken by the lessee in the year 1893, and that that number was practically authorized by him.

The great seal fisheries of the Pribilof Islands were not a piece of property merely, but a branch of commerce, to be dealt with by the Government as a sovereign and not as a corporate owner. They were to be regulated as the Government regulates interstate, foreign, or Indian commerce.

It is apparent from the law of 1870, the first lease, the Revised Statutes, and the act of 1874, that they were so regarded. Neither the particular Congress of 1870 nor the Secretary of the Treasury in leasing lost sight of the fact that it was a matter of that kind. Accordingly we have an instance of what was, or what the Government saw fit to recognize as, an exercise of the police power

such as one legislature or executive can not exhaust or tie up or bargain away. (*Beer Company v. Mass.*, 97 U. S., 33; *Stone v. Mississippi*, 101 U. S., 814.)

A mere license to engage in the seal-fishing business was given to the company, and Congress in 1870 expressly reserved to the Government the power to make whatever regulations of the business it might by law or executive act from time to time see fit to make.

Revised Statutes, section 1963, under which the later lease was made, was a condensation and abbreviation of the prior leasing section. It was immediately followed by the act of 1874, authorizing the Secretary to designate the month for taking seals and the number to be taken.

In leasing under section 1963 he was to have due regard to the interests of the Government and the protection of the fisheries; and when he made the second lease, he took pains to make it clear that the interests of the Government included the preservation intact of the whole police power to regulate the business.

He expressly stipulated that the company should abide by all rules and regulations concerning the taking of seals which he or his successors might make *in pursuance of law*, and concerning the comfort, morals, or other interests of the inhabitants of the islands, and all matters pertaining to the islands. This reserved the right to make future laws. He also expressly stipulated that the company should abide by any restrictions and limitations he or his successors might make upon the right to kill seals in order to preserve the fisheries. And then, as an independent provision, it was expressly stipulated

that the company was neither to kill, nor permit to be killed, a greater number in any year than the Secretary might authorize.

The license or lease was taken burdened with any regulations under any laws, past or future, that any Secretary, present or future, might make. The right to make any laws whatever looking to the regulation of the fisheries was thus recognized in the lease. A treaty is a law. It is submitted that the true construction of this lease of the right to take seals makes it subject to the whole police power of the Government, and that the lessee had no right to complain of any regulation that the Government saw fit to make in the exercise of its sovereign power over the fisheries.

For the license thus burdened the company saw fit to agree to pay \$60,000 per annum, etc.

It is contended by the Government that the rights reserved in the lease to the Secretary of the Treasury are, upon a proper construction of the transaction, rights reserved to the Government as principal.

The Government is impersonal. It acts and contracts through persons. No more was intended by the law of Revised Statutes, section 1963, than that the Government itself should lease by the hand of the Secretary, but for itself as principal and only lessor.

The company was one party and the Government the other. If it was agreed that the Secretary might regulate under whatever law the Government might make and whoever might be Secretary, this was equivalent to saying that the Government, the real contracting party,

might regulate, and as the greater includes the less so the power to control the Secretary in regulating embraced the power to regulate. Had some independent third party been chosen to regulate, that might be a different matter. But the Secretary would be under the orders of the Government in regulating, since he was to make any regulation he saw fit under any law the Government might choose to pass. The whole free will of the Government was thus reserved, and it is quite immaterial whether the Secretary on his own judgment or in compliance with the will of the Government manifested by law, treaty or otherwise, confined the number of seals taken in one year to 7,500.

The agreement was not to abide by regulations the Secretary might make upon his own judgment only, but also such as he might make *in pursuance of law*; that is, such as the Government might make through him.

Now the *modus vivendi* either bound him as a treaty—which is a law—or it did not. If it did, he was acting pursuant to a law; if not, he was acting upon his own judgment.

In exercising that free judgment, he could be guided by the *modus* or not, as pleased him; for his motive for making a regulation or limiting the catch is quite immaterial. He could limit the catch to preserve the fishery from extinction, or to *increase* it, or for any reason whatever. The lease, like the law of 1874, confines him to no particular reason.

The discretion to be exercised is not that of a particular man whose judgment is relied upon, nor of an officer who

is to reach his conclusion in a particular manner which may be relied upon to produce one result rather than another; but is the discretion of the Government generally, to be manifested by the Secretary acting under whatever orders the Government may from time to time give him and in whatever manner he or the Government sees fit.

Would such a contract fail if the office of Secretary should be abolished? No court would hold so.

The case is somewhat analogous to that of a contract for services. If there is no reliance upon the skill or character of the promisor, he can, upon occasion, perform by proxy or his administrator can perform. (*White v. Allen*, 133 Mass., 423.)

It would seem that where a servant contracts for and on behalf of his master, and the other party agrees to confine himself to what the servant or any substituted servant in his place may determine, at the same time leaving the master free to give whatever orders to the servant about the matter he sees fit and make any rules on the subject he sees fit and change the servant wherever he pleases, there should be some indication of an intention to separate the master and servant, or the natural inference will be that whatever the servant can do the master can do. Here it can not be denied that the Government could pass a law under which the Secretary would be compelled to restrict the killing of 7,500 seals; yet it is pretended that what the Government could thus do by law through the Secretary it can not do directly by the law itself. Its whole will was left free, but could be



executed only through a particular servant; yet no different result could have been anticipated by the parties—certainly no result more favorable to the other party.

Nothing is more common than for an undisclosed principal to substitute himself for his agent, and the only restriction upon his doing so is that no greater burden than could have been anticipated by the other party shall result from the failure to disclose and subsequent disclosure. In such cases a promise to permit the agent to determine or select would be a promise to permit the undisclosed principal. It is not apparent that a disclosed principal, particularly a Government, the real maker of the contract through the instrumentality of an official, can not regard itself as in the shoes of the agent, where no difference in the situation of the other party would result.

The present situation can not show the contract or intent or expectation of either party. It might have accidentally come about that the Secretary, after the modus, had permitted less than 7,500 seals to be taken; in other words, the master might have been willing to allow more favorable terms than the servant. The company (finding 12 and answer, paragraph 11) was offered 7,500 skins for 1893, took them, paid the amount (50 cents per skin) fixed by the Secretary under the lease as compensation to the natives for taking and loading the skins, and about the regular annual pay day under the lease tendered the further sum of \$23,789.50, being, according to its computation, the full amount due under the lease.

It is evident that there was no thought on either side of any reason for tendering and taking the 7,500 except

by reason of the lease. The company had no other right nor the officials any other authority.

It is also evident from the *treaty* and the tender and acceptance that the tender was all that was intended in the way of performance by the Government for the year 1893. If, therefore, this was a tender of performance under the lease, it was a tender of substantial full performance, and not as part performance. There was no expectation of any further performance in the way of permitting seal taking in 1893.

It was after the tender and receipt, and after the payment of the sum stipulated in the lease as due for taking and loading on board the skins, and with a full knowledge that there would be no further offer of compliance by the Government, that a question arose, not whether the parties had been tendering and accepting and paying under the lease, but as to what further sum was due *from the company* under the lease.

It is submitted that while an acceptance of *part* of a quantity does not require full performance on the other side, yet a tender of substantial performance and acceptance of it in silence prevents the accepting party from denying that there has been substantial performance on the ground that some act was done otherwise than the contract required. That is particularly true where the only difference between full performance and what was tendered is that the principal fixed the number of seals instead of its agent's doing so.

He who does not raise such an objection when he accepts can not be heard to do so after the other party

has parted with its property, for the known purpose of substantially performing its obligation, and the property has been accepted and disposed of. (*Rau v. City of Little Rock*, 34 Ark., 303, and authorities cited.)

The company knew that the Government instead of the Secretary had ordered what should be done as to the killing of seals in 1893, as well when it accepted the skins and when it paid the 50 cents and tendered the \$23,000 as it knows now. It knew that nevertheless the Government, not regarding the lease as broken, offered to proceed *under it* on the basis of the Government's orders. The company, giving no hint of its dissent, met the Government by corresponding acts under the lease, thus inducing the Government to part with its property.

This was a waiver of any right (if any) to draw the distinction between the Government and the Secretary, and that distinction can not now be asserted. (*Dressel et al v. Jordan*, 104 Mass., 407.)

#### EIGHTH POINT.

UPON THE THEORY ADOPTED BY THE CIRCUIT COURT, THAT THE UNITED STATES HAD ONLY PARTIALLY PERFORMED THE CONTRACT, THE AMOUNT OF THE RECOVERY WAS CORRECTLY ESTIMATED.

The lessee, having taken, received, and sold the 7,500 skins and kept the proceeds without any abandonment or rescission of the contract, or any offer to return the benefits received, is liable, on the contract, to pay therefor.

The rule is correctly laid down in *Benjamin on Sales*, 6th American Edition, section 690, as follows:

If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity, to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the quantity sold. But the buyer is bound to pay for any part that he accepts, and after the time for delivery has elapsed he must either return or pay for the part received, and can not insist upon retaining it without payment until the vendor makes delivery of the rest.

(See also *German Savings Institution v. Refrigerating Co.*, 70 Federal Reporter, 146, 149; *Kelsey v. Ward*, 38 N. Y., 83; *Cincinnati Siemens Co. v. Western Siemens Co.*, 152 U. S., 200.)

#### NINTH POINT.

The defendant's counterclaim was properly disallowed.

1. The court had no right to consider or allow the counterclaim, because it had not been presented to the proper accounting officer, namely, the Auditor for the Treasury Department, for examination.

The statutes governing this subject are section 951, *Revised Statutes*:

In suits brought by the United States against individuals *no claim for a credit* shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their

examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

And the *Act of July 31, 1894* (28 Stat. L., 162, sec. 7):

Accounts shall be examined by the auditors as follows: The Auditor of the Treasury Department shall receive and examine all accounts relating \* \* \* to Alaskan fur-seal fisheries, and to all other business within the jurisdiction of the Department of the Treasury, and certify the balances arising thereon to the division of bookkeeping and warrants.

Section 8 of the same act provides:

The balances which may from time to time be certified by the auditors to the division of bookkeeping and warrants, upon the settlements of public accounts, shall be final and conclusive upon the executive branch of the Government.

By section 4 of the same act, page 206, it is <sup>\*</sup>provided that—

The Auditors, under the direction of the Comptroller of the Treasury, shall superintend the recovery of all debts finally certified by them, respectively, to be due to the United States.

It is not claimed that this counterclaim was ever presented to the Auditor of the Treasury Department or ever in any manner passed upon by him.

The evidence shows nothing more than a request to the Secretary of the Treasury to present the claim to the accounting officers. It is not proven that it ever was before the accounting officers. The statute requires that the claim should have been disallowed by the accounting officer, who, at that time, was the Auditor of the Treasury Department. The only evidence of any action taken by any official of the Treasury Department is the letter signed by the Assistant Secretary of the Treasury, who says: "I have to inform you that the claim is rejected hereby." (Ex. 33). Neither the Secretary of the Treasury nor the Assistant Secretary were accounting officers of the Treasury. In *United States v. Gilmore* (7 Wall, 491) it is held that evidence of the presentation and allowance or disallowance of a claim must be taken from the books of the Treasury, and that evidence of that nature is indispensable. The statement, therefore, of the Assistant Secretary of the Treasury that the claim was rejected was no evidence to prove that it was rejected by the Auditor of the Treasury Department. The presentation of a proper claim and its disallowance by the Auditor of the Treasury were necessary to be proved in the first instance as the foundation for proof of the merits of the claim itself. Until such foundation was laid, no proof of the merits of the claim should have been permitted. In *Watkins v. United States* (9 Wall., 759) it was held that no claim is lawfully presented under Revised Statutes 951 unless accompanied by a statement of the items and the vouchers in respect thereto. See, further, as to the necessity under Revised Statutes 951 of presenting claims to the proper accounting officer, *Ware v.*

*United States* (4 Wall., 617, 629) and *United States v. Giles* (9 Cranch., 212, 236).

Although the counterclaim was in its nature a claim for an undetermined amount of damages depending upon facts to be proved by evidence partly resting in the opinion of witnesses, nevertheless it was in the nature of an account within the meaning of the act of July 31, 1894 (28 St. L., 162, sec. 7).

The undoubted purpose of Congress was to make this provision apply to claims of every nature which might require the payment of money or the allowance of money by the United States.

In section 951 the language is "*no claim for a credit*" shall be admitted upon trial.

There is no reason to hold that a claim for unliquidated or undetermined damages should be excepted from the meaning of this language. Every reason which makes it proper to submit claims for definite sums makes it also proper to submit claims for undefined amounts to the officers established by law for that purpose.

The object of the legislation seems to have been to provide a means by which a balance might be struck between the United States and individual claimants. Section 8 directs that the balances which may from time to time be certified by the Auditors shall be final and conclusive upon the executive branch of the Government. Thus final and conclusive effect is given by the statute to the judgment of the Auditor. Even the Secretary of the Treasury himself can not overrule such decision. Much less can the Secretary of the Treasury make the decision in the first instance.



Counsel for the plaintiff in error, conscious evidently of the fatal defect in his counterclaim, has shifted his ground from the position occupied by him in the argument before the circuit court of appeals, and now claims that, although it may be true that the damages of the defendant set up in its counterclaim can not be considered and passed upon as a matter of affirmative relief, yet they may be available to the defendant as a matter of *defense* to the action. This result he seeks to obtain by an extension of the doctrine of partial failure of consideration into the modern doctrine of recoupment.

No doubt as between private individuals in litigation it is true, as stated by this court in *Withers v. Greene* (9 How., 213, 230), that—

It has repeatedly been decided by learned and able judges in our own country, when acting not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied upon as defense by a party when sued on such contracts.

In *Dushane v. Benedict* (120 U. S., 630, 637) this court, speaking by Mr. Justice Gray, says:

In an action for the price of goods sold, or of work done, the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of recoupment of the sum that the plaintiff may recover. In England this is only allowed so far as it effects the

value of the goods sold, or of the work done. (*Davis v. Hedges*, L. R., 6 Q. B., 687, and cases there cited.) But in this country the courts, *in order to avoid circuity of action*, have gone further and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence of the plaintiff growing out of and relating to the transaction in question.

The object of allowing this recoupment in cases where it does not affect the value of the goods sold or the work done, but relates to other and separate provisions of the same contract, is expressly stated to be the avoidance of circuity of action. It is so stated in the case of *Harrington v. Stratton* (22 Pick., 510, 517), where Mr. Justice Dewey says:

It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit, and it is upon this ground that the courts have of late been disposed to extend to the greatest length *compatible with the legal rights of the parties* the principle of allowing evidence in defense or in reduction of damages to be introduced rather than to compel the defendant to resort to his cross action.

The same reason is given in *Winder v. Caldwell* (14 How., 434, 443).

*Nichols v. Dusenbury* (2 N. Y., 286) was an action which arose out of a distress for rent. As a matter of recoupment, defendant set up the failure to complete the building in accordance with the contract of lease. The court said:

It is a matter which is never pleaded in bar. It is in the nature of a cross action. The right of

the plaintiff to sue is admitted, but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off, or keep back so much of the plaintiff's damages as will satisfy the damages which have been sustained by the defendant.

In *Price v. Reynolds* (39 N. J. L., 171) it is said :

The doctrine of recoupment is unknown to the common law.

In recoupment a breach of the contract in suit alleged to have been committed by the plaintiff is set off against the alleged breach of another stipulation in another contract forming the basis of the suit. It is allowable to rebut the consideration, but not to interpose a counterclaim to the cause of action of the plaintiff.

Whatever may be the rule of law to be applied in this court as to counterclaims in the nature of recoupment in suits between private individuals, *in cases where the United States is a party, no claim of set-off or counterclaim by way of recoupment can be allowed unless the defendant has complied with the requirements of the United States Statutes with reference to claims for credit.* Of course, in an action brought by the United States against an individual for the price of goods sold and delivered it would be competent by way of defense to show that the goods were of an inferior quality, or any other circumstances arising out of the nature or character of the goods themselves that would tend to lessen their value, and thereby to lessen the amount of the recovery. But admitting the correctness of the demand of the United States as a plaintiff for the particular items sued on, it is not proper under the statutes to permit a defendant to set up, by

way of defense or in reduction of the amount due the plaintiff, a claim for damages arising out of the alleged violation of a separate covenant in the same contract.

In the language of Chief Justice Beasley, "it is allowable to rebut the consideration, but not to interpose a counterclaim to the cause of action."

"No action of any kind can be sustained against the Government itself for any supposed debt, unless by its own consent, under some special statute allowing it." (*Reeside v. Walker*, 11 How., 272, 290.) In that case the court further says :

The sovereignty of the Government not only protects it against suits directly, but against judgments even for costs when it fails in prosecutions. *Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented.*

To permit a demand in set-off against the Government to be proceeded on to judgment against it would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals by a species of reconvention, when demands in set-off are sought to be recovered it could not be as against the Government except by a mere evasion, and must be as useless in the end as it would be derogatory to judicial fairness. A set-off or reconvention is often to be treated as a new suit by the defendant, and the pleadings and judgment are to be made to correspond.

See also *Watkins v. United States* (9 Wall., 759). In that case it is stated :

Whether the claim for credit is a legal or *equitable claim*, if it has been duly presented to the accounting officers and has been by them disallowed, it is

the proper subject of set-off under that act, but it can not be adjudicated in a Federal court unless it has been so presented and disallowed.

Questions of set-off in the Federal courts arise exclusively under the acts of Congress, and no local law or usage can have any influence in their determination. *Claims for credit can not be admitted in suits between the United States and individuals unless they have been duly presented to the accounting officers of the Treasury, and have been by them disallowed, because it is so provided by an act of Congress.* Supported as the ruling of the court is by an act of Congress and by a course of decisions extending through a period of three-quarters of a century, it can hardly be expected that it will be disproved.

The question in this case is not how much the plaintiff is entitled to for its demand. The amount of that is conceded. The question raised by the counterclaim is how much the plaintiff's demand should be reduced or liquidated by the separate and independent demand of the defendant. This is practically setting one cause of action off against another, a thing that can not be done except between ordinary parties in order to avoid circuitry of action, and in some States only by virtue of express statutes.

The United States can very well adopt the expression of the law of recoupment quoted in the brief of the learned counsel for the plaintiff in error on page 80:

The comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipu-

lated to be done on each side, as the consideration done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, *it sums up the grievances on each side instead of the plaintiff's side only, strikes a balance, and gives the difference to the plaintiff if it is in his favor.*

But this summing up the grievances on each side, striking a balance, and giving the difference to the plaintiff, is conditioned, in cases in which the United States is a party, upon the compliance by the defendant with those things which Congress has made a prerequisite for a claim of credit against the Government in suits brought by it against individuals.

The contention of the plaintiff in error is met completely by section 951.

The North American Commercial Company is not without remedy if it has a ground of complaint against the Government sounding in damages arising out of this contract. It can present its claim to the Auditor, and then if disallowed, may bring suit against the Government.

Admitting that the defensive matter urged by way of recoupment might be made use of without borrowing any aid from the statutes of set-off, nevertheless it can not be made use of against the Government, because such use is expressly barred by statute.

In studying the decisions of the different courts relating to questions of set-off, recoupment and counterclaim, it will be observed that great inaccuracy prevails. It will be necessary to examine the facts in each case and the

nature of the particular counterclaim set up in order to ascertain whether the defense claimed an ordinary set-off or recoupment by way of damages limited to the amount of the plaintiff's claim, or an affirmative judgment upon a counterclaim authorized by special procedure.

No error prejudicial to the plaintiff in error appears in the record, and therefore the judgment should be affirmed.

JOHN W. GRIGGS,  
*Attorney-General.*

## APPENDIX A.

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### COPY OF THE LEASE.

This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890;

Witnesseth, that the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company, for a term of twenty years from the 1st day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following—that is to say:

To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars; and in addition thereto agrees to pay the revenue tax, or duty, of



two dollars, laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay to said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands; and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it, made from seals that may be taken on said islands during the said period of twenty years; and to secure the prompt payment of the sixty thousand dollars rental above referred to, the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon, and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine.

That it will also furnish to the said inhabitants eighty tons of coal annually, and a sufficient number of comfortable dwellings in which said native inhabitants may reside; and will keep said dwellings in proper repair; and will also provide and keep in repair such suitable school-houses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers who shall be paid by the company a fair compensation; all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and

will also provide a competent physician, or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

The said company further agrees to employ the native inhabitants of said islands to perform such labor, upon the islands, as they are fitted to perform, and to pay therefor a fair and just compensation such as may be fixed by the Secretary of the Treasury; and also agrees to contribute as far as in its power all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States; it also agrees to obey and abide by any restrictions or limitations upon the right to kill seals, that the Secretary of the Treasury shall judge necessary under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The said company further agrees that it will not permit any of its agents to keep, sell, give or dispose of any distilled spirits or spirituous liquors, or opium, on either of said islands or the waters adjacent thereto, to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same, at any time, on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals, or concerning the islands of St. George and St. Paul, or the inhabitants thereof.

In witness whereof, the parties hereto have set their hands and seals the day and year above written.

(signatures).



## Statement of the Case.

NORTH AMERICAN COMMERCIAL COMPANY *v.*  
UNITED STATES.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT.

No. 431. Argued April 18, 19, 1898. — Decided May 31, 1898.

By the agreement of March 12, 1890, between the United States and the North American Commercial Company, that company contracted to pay to the United States a rental of \$60,000 per year, during the term of the contract, for the privilege of killing an agreed number of seals each year, subject to a proportionate reduction of this fixed rental, in case of a limitation in the number; and also a further sum of seven dollars, sixty two and one half cents for each seal taken and shipped by it. *Held* that this per capita tax was not a part of the annual rental, and was not subject to reduction as was the annual rental of \$60,000 a year.

The proviso in the original act for the naming of a maximum number of seals to be taken, which was not to be exceeded, and making a proportionate reduction in the fixed rental in case of a limitation of that number, remained in force through all subsequent legislation and contracts. Assuming that the company took all the risk of a catch reduced by natural causes, yet when the number that might be killed was reduced by the act of the Government, the company was entitled to such reduction on the reserved rental as might be proper, that is, in the same proportion as the number of skins permitted to be taken bore to the maximum.

The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power, subject to which the lease was taken, and if the Government found it necessary to exercise that power, to the extent which appears, the company did not attempt to rescind or abandon, but accepted the performance involved in the delivery of the 7500 skins.

The company cannot maintain its counterclaim for damages for breach of the lease, and the Circuit Court erred in its disposition thereof.

This was an action brought by the United States against the North American Commercial Company to recover the sum of \$132,187.50, with interest, for rent reserved for the year ending April 1, 1894, under a so called lease, bearing date March 12, 1890, made by the Secretary of the Treasury to the company, and for royalties upon seventy-five hundred fur seal skins taken and shipped by the company that year in virtue of that instrument, and for the revenue tax of two

## Statement of the Case.

dollars on each skin. The claim of the Government consisted of these items:

Annual rental.....	\$60,000 00
Revenue tax on 7500 skins at \$2.....	15,000 00
Per capita at \$7.62 $\frac{1}{2}$ on 7500 skins.....	57,187 50
Total .....	<u>\$132,187 50</u>

And interest thereon from April 1, 1894.

The case was tried by the Circuit Court without a jury. The court found for the United States in the sum of \$94,687.50, with interest, and judgment was entered in their favor for \$107,257.29, principal, interest and costs. 74 Fed. Rep. 145.

The company having taken a writ of error to the Circuit Court of Appeals for the Second Circuit, that court certified a certain question arising in the cause concerning which it desired the instructions of this court for its proper decision, whereupon this court ordered that the whole record and cause be sent up for consideration. A counterclaim of the company against the United States for breach of the lease was disallowed and dismissed by the Circuit Court, but not on the merits, and without prejudice to the right of the company to enforce the same by any other proper legal proceeding.

The agreement of lease out of which the cause of action arose is as follows:

"This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890, witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company for a term of twenty years from the first day of May, 1890, the

## Statement of the Case.

exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

"The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following, that is to say:

"To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years, and to secure the prompt payment of the sixty thousand dollars rental above referred to the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

"That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

"That it will also furnish to the said inhabitants eighty tons of coal annually and a sufficient number of comfortable dwellings in which said native inhabitants may reside, and

## Statement of the Case.

will keep said dwellings in proper repair, and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury, and will also provide and maintain a suitable house for religious worship, and will also provide a competent physician or physicians and necessary and proper medicines and medical supplies, and will also provide the necessities of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

"The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

"The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to perform and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education and promote the morals and civilization of said native inhabitants.

"The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary



## Statement of the Case.

of the Treasury shall judge necessary, under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

"The said company further agrees that it will not permit any of its agents to keep, sell, give or dispose of any distilled spirits or spirituous liquors or opium on either of said islands or the waters adjacent thereto to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

"It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

"The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same at any time on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any treasury regulation respecting the taking of fur seals or concerning the islands of St. George and St. Paul or the inhabitants thereof."

The Circuit Court made eighteen findings, including the following:

"Sixth. The said islands of St. George and St. Paul in the Territory of Alaska are the breeding ground of a herd of seals which in the early spring moves northward to Behring Sea, and are the habitat of that herd during the summer and fall of each year; that the seals land in great numbers upon the said islands and divide into families, each consisting of one male or bull and many females or cows; that the young or male seals, or bachelors as they are called, are not admitted to the breeding ground, but are driven off by the older males and oftentimes destroyed by them; that until such bachelor seals arrive at the age of three or four years they occupy other portions of the islands and can be driven away from the breeding ground and killed without disturbing the seals

## Statement of the Case.

on the breeding grounds; that a large proportion of these young bachelor seals may be so killed without diminishing the birth rate of the herd, and their skins are a valuable article of commerce and are more valuable than the skins of the females or older males; that by protecting the females and restricting the capture to the bachelors the fisheries are capable of a permanent and annual supply of skins which would afford a valuable source of revenue.

"Seventh. That after the making of the said lease by the said plaintiff and the said defendant, the said defendant entered upon the enjoyment of the right thereby granted it; but on account of the enforcement by the said plaintiff of the provisions of a convention or agreement made and entered into by the said plaintiff with the Government of Great Britain it prohibited and prevented the said defendant, during the years 1890, 1891 and 1892, from taking on the said islands as many seals as might have been taken without diminution of the herd, and far less in each year than the number mentioned in the said lease for the first year; the numbers taken in those years being in 1890, 20,995; in 1891, 13,482; and in 1892, 7547.

"Eighth. That for the said years of 1890, 1891 and 1892, it was agreed between the Secretary of the Treasury and the said defendant that the said defendant should pay to the said plaintiff for the seal skins taken by it on the said islands the tax and such proportionate part of the rental of \$60,000 and the per capita sum of seven dollars sixty-two and one half cents, as the number of seals taken bore to one hundred thousand, except that for 1890 the per capita of seven dollars sixty-two and one half cents was not so reduced.

"Ninth. That by a convention or agreement with the Government of Great Britain, commonly called the *modus vivendi*, the United States promised, during the pendency of the arbitration between those two governments relating to the Behring Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the said islands in excess of 7500 to be taken from the islands for the subsistence of the natives, and to use promptly its best efforts to insure the enforcement of the prohibition.

## Statement of the Case.

"Tenth. That pursuant to such agreement the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.

"Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred upon him by section 1962 of the Revised Statutes to limit the right of killing seals when necessary for the preservation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7500 specified in the said *modus vivendi*.

"Twelfth. That in the year 1893 the United States Government itself, through the agents of the Treasury Department, took upon the said islands 7500 seals; that the said defendant was permitted to coöperate in selecting the seals so killed, and to take, and it did take and retain the skins of those seals, and in this way, and in this way only, the defendant received those 7500 skins.

"In accordance with the power reserved to him in said contract, the Secretary of the Treasury at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of \$3750.

"Thirteenth. That 20,000 bachelor seals could have been killed upon the said islands during the year 1893 in the customary way, without injury to or diminution of the herd, and the said defendant would have taken that number had it been permitted so to do.

"Fourteenth. That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, 20,000

## Statement of the Case.

seal skins, there would have been due to the said plaintiff the \$60,000 rental and for the per capita of seven dollars and sixty-two and one half cents and the revenue tax of two dollars per skin, the sum of \$192,500, making together the sum of \$252,500—that is, twelve dollars and sixty-two and one half cents for each seal skin taken; that for the 7500 received by the said defendant, as above set forth, it owes to the said plaintiff the said sum of twelve dollars and sixty-two and one half cents apiece, amounting to the sum of \$94,687.50.

“Fifteenth. The defendant could have sold 12,500 more seal skins if it had been allowed to take the same on the said islands during the year 1893, at the average market price of twenty-four dollars for each skin; which for the said number of 12,500 which it might have taken, but was prevented from taking by the act of the Government of the United States, would amount to \$300,000; that for such 12,500 seal skins the said defendant would have been liable to pay, according to the terms of its lease if had taken 20,000 seal skins during that year, the sum of twelve dollars and sixty-two and one half cents each, amounting to \$157,812.50, which being deducted from the price at which such skins could have been sold, namely, \$300,000, leaves as the net loss sustained by the said defendant in consequence of the breach of its said lease by the said plaintiff, the sum of \$142,187.50, which is due and owing to the said defendant by the said plaintiff; and that its claim therefor would be a proper matter of counterclaim or credit in this action, if the conditions prescribed by section 951 of the United States Revised Statutes had been complied with by the said defendant.”

“Eighteenth. The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States in entering into the said convention or *modus vivendi* with Great Britain and limiting the catch of seals upon the said islands to 7500; and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was

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not proved to the satisfaction of the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident."

The Circuit Court made these conclusions of law :

"First. That the said defendant, having received the said 7500 seal skins taken from the said islands during the year 1893, is liable to pay the said plaintiff therefor the said sum of \$94,687.50, with interest thereon from the first day of April, 1894; and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant.

"Second. That by reason of the breach of the said lease by the said plaintiff, prohibiting the said defendant from taking any seal skins during the year 1893, the said plaintiff is liable to the said defendant for the said sum of \$142,187.50, with interest thereon from the first day of December, 1894.

"That on account of the same claim of the said defendant against the said plaintiff for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it cannot be allowed as a counterclaim or credit in this action, and the said counterclaim is therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding."

*Mr. James C. Carter* for plaintiff in error.

*Mr. Attorney General* for defendants in error.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

By the act of July 27, 1868, c. 273, 15 Stat. 240, the laws of the United States relating to customs, commerce and navigation were extended over all the mainland, islands and

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waters of the territory ceded to the United States by the Emperor of Russia, March 30, 1867, so far as applicable, and by section six of that act it was made unlawful for any person or persons to kill any otter, mink, marten, sable or fur seal, or any other fur-bearing animal within the limits of said territory, or in the waters thereof; provided that the Secretary of the Treasury might authorize the killing of any such fur-bearing animal, except fur seals, under such regulations as he might prescribe, and it was made his duty to prevent the killing of any fur seal, and to provide for the execution of the provisions of the section until otherwise provided by law. On the third of March, 1869, a resolution was approved, 15 Stat. 348, No. 22, entitled "A resolution more efficiently to protect the fur seal in Alaska," declaring the islands of St. Paul and St. George in Alaska "a special reservation for government purposes," and that, until otherwise provided by law, it should be unlawful for any person to land or remain on either of said islands, except by the authority of the Secretary of the Treasury.

July 1, 1870, an act entitled "An act to prevent the extermination of fur-bearing animals in Alaska" was approved. 16 Stat. 180, c. 189. By the first section it was made unlawful to kill any fur seal upon the islands of St. Paul and St. George or in the waters adjacent thereto, except during the months of June, July, September and October in each year, or to kill such seals at any time by the use of firearms, or to use other means tending to drive the seals away from said islands. Provided, that the natives should have the privilege of killing such young seals as might be necessary for their own food and clothing during other months, and also such old seals as might be required for their own clothing and for the manufacture of boats for their own use, which killing should be limited and controlled by such regulations as should be prescribed by the Secretary of the Treasury.

By section two it was made unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and also to kill any seal in the waters adjacent to the islands, or on the beaches, cliffs or rocks where they haul up from the sea to remain.

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The third section reads as follows :

"SEC. 3. That for the period of twenty years from and after the passage of this act the number of fur seals which may be killed for their skins upon the island of St. Paul is hereby limited and restricted to seventy-five thousand per annum ; and the number of fur seals which may be killed for their skins upon the island of St. George is hereby limited and restricted to twenty-five thousand per annum : *Provided*, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as shall be right and proper ; and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act."

The fourth section provided that immediately after the passage of the act the Secretary of the Treasury should lease for the rental mentioned in the sixth section of the act, to the best advantage of the United States, having due regard for the interests of the government, the native inhabitants, parties theretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the first day of May, 1870, "the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, and to send a vessel or vessels to said islands for the skins of such seals," giving a lease duly executed, and not transferable, and taking from the lessee or lessees a bond, conditioned "for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith ; and in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance and education of the natives thereof."

The fifth section read :



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"SEC. 5. That at the expiration of said term of twenty years, or on surrender or forfeiture of any lease, other leases may be made in manner as aforesaid, for other terms of twenty years; . . . and any person who shall kill any fur seal on either of said islands, or in the waters adjacent thereto, without authority of the lessees thereof, and any person who shall molest, disturb or interfere with said lessees, or either of them, or their agents or employes in the lawful prosecution of their business, under the provisions of this act, shall be deemed guilty of a misdemeanor, and shall for each offence, on conviction thereof, be punished in the same way and by like penalties as prescribed in the second section of this act; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews shall be found engaged in any violation of either of the provisions of this section, shall be forfeited to the United States; and if any person or company, under any lease herein authorized, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then said person or company shall forfeit the value of the same. . . ."

By the sixth section it was provided that "the annual rental to be reserved by said lease shall not be less than fifty thousand dollars per annum, . . . and in addition thereto, a revenue tax or duty of two dollars is hereby laid upon each fur seal skin taken and shipped from said islands during the continuance of such lease to be paid into the Treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same, for the comfort, maintenance, education and protection of the natives of said islands, and also for carrying into full effect all the provisions of this act."

These provisions as well as others from the prior legislation were carried forward into the Revised Statutes, approved



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June 22, 1874, sections 1954 to 1976 constituting chapter three of Title XXIII, relating to the territory of Alaska, and sections 1956 to 1976 thereof to the subject under consideration.

By section 1960 the killing of any fur seals upon the islands or their adjacent waters was forbidden, except during June, July, September and October in each year, etc., with the same proviso as in the first section of the act of 1870.

Sections 1962, 1963, 1968, 1969, 1972 and 1973 were as follows:

"SEC. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

"SEC. 1963. When the lease heretofore made by the Secretary of the Treasury to 'The Alaska Commercial Company,' of the right to engage in taking fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July 1, 1870, chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United

## Opinion of the Court.

States bonds to that amount, and every such lease shall be duly executed in duplicate, and shall not be transferable."

"SEC. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

"SEC. 1969. In addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur seal skin taken and shipped from the islands of Saint Paul and Saint George, during the continuance of any lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is empowered to make all needful regulations for the collection and payment of the same, and to secure the comfort, maintenance, education and protection of the natives of those islands, and also to carry into full effect all the provisions of this chapter except as otherwise prescribed."

"SEC. 1972. Congress may at any time hereafter alter, amend or repeal sections from nineteen hundred and sixty to nineteen hundred and seventy-one, both inclusive, of this chapter.

"SEC. 1973. The Secretary of the Treasury is authorized to appoint one agent and three assistant agents who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury."

Pending the adoption of the Revised Statutes, and on March 24, 1874, 18 Stat. 24, c. 64, the act of July 1, 1870, was amended so as to authorize the Secretary of the Treasury to designate the months in which fur seals "may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about the islands respectively." Thus the

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Revised Statutes were in effect amended so that whereas by section 1960 the months of June, July, September and October had been designated as the months in which fur seals might be taken on the islands and in the waters adjacent thereto, for their skins, and by section 1962 the maximum number which might be killed on the island of St. Paul was limited to 75,000, and on the island of St. George to 25,000, per annum, the Secretary of the Treasury was authorized by the amendatory act to designate the months in which fur seals might be taken, and the number to be taken on or about each island respectively. The times of killing and the number to be killed were left to the judgment of the Secretary of the Treasury.

Manifestly the object the Government had in view throughout this legislation was the preservation by proper regulations of the fur-bearing animals of Alaska, including, and particularly, the fur seals.

The first twenty years being about to expire the Secretary of the Treasury on December 24, 1889, advertised for proposals "for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska, for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States." Among other things, the advertisement stated: "The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury, in accordance with the provisions of law."

There were twelve proposals or bids, of which the North American Commercial Company put in three, numbered 10, 11 and 12, each of which offered a gross sum as rental, and, in addition to that and the revenue tax, a royalty per capitem. The three bids set forth the advertisement at length. No. 10 contained a proviso that the proposal was made on the express condition that the United States should not, through the Secretary of the Treasury, or otherwise, limit the skins to be taken to any number less than one hundred thousand skins per

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annum after the first year of the lease; and No. 12 made the express condition that the United States should protect the exclusive right of the fur seal fisheries in and within the islands, and the waters known as the "Behring Sea." No. 11 contained no such express conditions, and it was this bid which was accepted by the Government. The lease in question was thereupon entered into "in pursuance of chapter 3 of title 23, Revised Statutes," as it recites.

By its terms, the company undertook, in consideration of the lease for twenty years of "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals," "to pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars upon each fur seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur seal skin taken and shipped from said islands, . . . and to secure the sixty thousand dollars rental above referred to" to deposit United States bonds of the face value of fifty thousand dollars; and further "faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall adjudge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury."

It was also agreed that, "the annual rental, together with

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all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891." The lease also provided that the number of fur seals to be taken and killed for their skins during the year ending May 1, 1891, should not exceed sixty thousand.

1. It is contended on behalf of the company that, conceding that the right of killing in 1893 had been duly limited to seventy-five hundred seals, and that it took and received that number of skins as full performance of the covenants of the lease on the part of the Government, it is entitled under section 1962 of the Revised Statutes to a proportionate reduction of the rent reserved, that is, in the proportion that 7500 bears to 100,000; and that this reduction applies to the per capita of  $\$7.62\frac{1}{2}$  for each fur seal skin taken and shipped by it, as well as to the \$60,000 annual rental. On this theory, the company tendered to the United States, before action brought, the sum of \$23,789.50, being \$15,000 for the tax on 7500 skins; \$4500, three fortieths of the annual rental; and \$4289.50, three fortieths of the full royalty on the skins.

The latter branch of this contention may be dismissed at once as untenable. By the terms of the lease, the per capita of seven dollars sixty-two and one half cents for each and every skin was not a part of the annual rental. The lease is explicit that the annual rental is the sum of \$60,000, and that in addition the lessee shall pay the revenue duty of two dollars per skin, and also pay the further sum of this royalty on each and every skin. United States bonds were to be deposited "to secure the prompt payment of the sixty thousand dollars rental above referred to," and "the annual rental, together with all other payments to the United States provided for in this lease," was to be paid on or before the first of April of each and every year.

We think the rent reserved as such was this specified annual rental, and that the per capita payment was in the nature of a bonus in the sense of an addition to the stated consideration.

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The Secretary was to lease to the best advantage to the United States, and that included the right to accept an offer of this kind; and while the per capita was a part of the return to the Government, it does not follow that the provision for reduction had reference to anything else than the specific rental, nor is any other construction compelled by the fact that the per capita might exceed the rental. Natural causes might diminish the catch so that this would not be so, and, at all events, the construction of the words of the statute and contract cannot be controlled by the amount of the reduction in one view rather than the other. Of course at the time the lease was made it is evident that it was supposed that sixty thousand seals might be taken annually, and on that basis the per capita royalty would be the principal compensation of the Government. This made it directly to the interest of the Government to allow the largest possible catch, which was undoubtedly a reason for the offer of the lessee in that form, as it tended to induce great circumspection in prescribing any limitation.

On the other hand, it may be that each seal would cost more as the number taken was less, and that, if the price of skins did not keep up, the company might be subjected to a loss, no matter how many it took, and the loss might be greater the more it took. But that was a risk the company assumed, and no reason is perceived for relieving it from the consequences.

The reduction of what the company agreed to pay, so far as the per capita was concerned, regulated itself. The smaller the number of skins, the less the company would pay, the larger the number, the more. We conclude that there is no adequate ground for holding that there should be any reduction on the per capita, which necessarily had to be paid.

By section 1962 of the Revised Statutes it was provided, as it had been by section three of the act of 1870, that for the period of twenty years from July 1, 1870, the number of fur seals which might be killed for their skins on the island of St. Paul was limited to 75,000 per annum, and the number which might be killed on the island of St. George to 25,000;

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but the Secretary of the Treasury might limit the right of killing if it became necessary for the preservation of such seals, "with such proportionate reduction of the rents reserved to the Government as may be proper."

By section five of the act of 1870, that at the expiration of the first term of twenty years, or its termination by surrender or forfeiture, other leases might be made "in manner as aforesaid, for other terms of twenty years;" and by section 1963 of the Revised Statutes, that, when the first lease, or any future similar lease, expired, or was surrendered, forfeited or terminated, the Secretary should again lease for the term of twenty years.

It is argued with great force on behalf of the Government that whether reference be had to the act of 1870, or to the Revised Statutes, the limitation of the maximum number was expressly made only for a period of twenty years from July 1, 1870; that that limitation determined with the expiration of that period, and that consequently the provision for a proportionate reduction of rental in case of a limitation by the Secretary did not afterwards apply. But, taking the entire legislation into consideration, as we may, and indeed must, in accordance with well-settled rules of construction, when interpretation results in fairly differing meanings, *United States v. Lacher*, 134 U. S. 624, 626; *Barrett v. United States*, 169 U. S. 218, 227, we are not persuaded that this position is correct.

In giving authority to make the first lease, by section four of the act of 1870 the character of the lease was described, and a provision for further leases was made in section five, which referred back to the description in section four by saying that other leases might be made, "in manner as aforesaid for other terms of twenty years." When, however, the statutes were revised, the first lease had been executed and was running, and the words "in manner as aforesaid" were eliminated. The provision for succeeding leases was made the subject of section 1963, and, in declaring what they should be, the same language was used as that employed in the original act, whereby the character of future leases was indicated.



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And section 1968, taken from the latter part of section five of the act of 1870, provided for the forfeiture of all the skins "if any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed."

It is said that the words "under any lease herein authorized" were intended to apply to the then pending lease, and that the purpose of the section was to provide for a forfeiture against any new lessee who might come in under a lease made on the happening of either of the contingencies mentioned in section 1963, as applied to the first lease, but we think the operation of the section was not intended to be thus restrained, and that it referred to any lease authorized under the chapter, and applied the forfeiture to the killing of seals in excess of the maximum number prescribed, which was to remain, if, when the time arrived for a new bidding, no change had been made by Congress.

The revision of the statutes was approved June 22, 1874, but by the last section, section 5601, provision was made that legislation between December 1, 1873, and the date of enactment should take effect as if passed subsequently.

Accordingly the act of May 24, 1874, operated by way of amendment, and by authorizing the Secretary to designate the months during which seals might be taken and the number to be taken on or about each island respectively, removed the restrictions imposed by sections 1960 and 1962 in those regards. The next day after the approval of the act, the then Secretary availed himself of it by entering into an agreement with the company that the lease of 1870 should be amended so as to provide that not more than 90,000 seals should be killed per annum on the island of St. Paul, and not more than 10,000 on the island of St. George, and that no seals should be killed in any other month except the months of June, July, August to the 15th, September and October. It seems to us reasonably clear that the specific restriction as to number, which, with the other restriction as to the months, it was the object of the act to remove, had relation to the dis-



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tribution as between the two islands "respectively," and if it were proper to resort to what passed in Congress no doubt could be entertained on the subject. When the bill was reported from the Committee on Commerce no written report was made, but its purpose and scope were explained on behalf of that committee in each house and those explanations declared the object to be as above indicated.

Although the authority conferred as to the times of killing and the number to be killed was continuing and discretionary, and although the company in the present lease covenanted that it would not kill in any year a greater number than was authorized by the Secretary, yet we think it would be going much too far to hold that the original provision for a maximum number, and a proportionate reduction of the fixed rental in case of a limitation, was done away with by implication.

Repeals where the intention to do so is not expressed are not favored, and, moreover, here the mischiefs sought to be remedied are quite obvious. One was that it was evidently thought that seals might properly be taken during the first half of August, and the existing statute forbade this; the other was, that the maximum was fixed for each island, whereas it had probably been ascertained that the distribution was erroneous, or that the numbers that might be safely taken on one or the other might vary, and consequently that greater elasticity was desirable. The language by which these objects were attained was entirely reconcilable with the prior law so far as it did not purport to change it.

The legislation from the beginning was directed to the preservation of the fur seals, and the act of 1870 recognized that it might be necessary to such preservation that the number to be killed in the different years should be varied, and the discretion to do this was vested in the Secretary, but while this authority was made more comprehensive by the act of 1874, and a redistribution as between the two islands authorized, we cannot accept the view that it was the intention by that act to wholly change the scheme of leasing by making the discretion of the Secretary purely arbitrary, and dispensing with any maximum or reduction.

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It should be added that the action of the Treasury Department in the matter of the abatement of rent for 1890, 1891 and 1892 does not impress us as amounting to such departmental construction as entitles it to any particular weight, and the views of the Department of Justice were conflicting.

Reference is made to Article V of the treaty of 1892 extending the *modus vivendi* and the action taken under it before the Tribunal of Arbitration, as if amounting to an estoppel, or an admission against interest, or at the least as having some considerable bearing on the construction of the lease and the statutes. That article provided, among other things, that "if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds." And it appears that the United States originally presented as part of its case a claim for the recovery of the damages which it and its lessee had sustained by reason of the limitation to 7500, but this claim was certainly not presented as a claim which the company could maintain against the United States under the lease, and it involved no question of the power of the Secretary in respect of the lessee under the covenants of that instrument. There was no element of estoppel about the transaction, and counsel had no authority to bind the Government for any other purpose than the pending cause.

Moreover, counsel for the United States were constrained to expressly admit that the evidence failed to establish that an additional take over and above the seventy-five hundred could have been safely allowed. In the argument on behalf of the United States, Judge Blodgett, one of the counsel, and all the counsel concurred, made this statement: "Frankness requires us, as we think, to say that the proofs which appear in the counter case of the United States as to the condition of the seal herd on the Pribiloff Islands show that the United

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States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *modus vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the tribunal to the proofs, and submit the question to its decision." And later, counsel announced that the United States would not ask the tribunal for any finding for damages upon and under Article V.

Our opinion is, that, assuming that the lessee took all the risk of a catch, reduced by natural causes, yet that when the number that might be killed was limited by the act of the Government or its agent, the Secretary, the company was entitled to such reduction on the rental reserved as might be proper, and that the rule to be observed in that regard would be a reduction in the same proportion as the number of skins permitted to be taken bore to the maximum. This would reduce the annual rental for the year under consideration from \$60,000 to \$4500; the tax due would be \$15,000, and the per capita \$57,187.50, making a total of \$76,687.50.

2. Laying out of view the concession under the first proposition, the company further contended that the prohibition by the United States, by agreement with Great Britain, of seal killing in excess of 7500, to be taken on the islands for the subsistence of the natives, relieved the company from its covenants for the payment of rent and royalty, and that no action could be maintained therefor on the lease.

The evidence disclosed that prior to 1890 the number of seals annually resorting to these islands was rapidly diminishing. This was attributed to the open sea or pelagic sealing, whereby the seals, especially the females, who were exempt from slaughter under the laws of the United States, were interrupted in their passage to the islands by the crews of foreign vessels and were killed in great numbers while in the water. For several years the United States, asserting that it had territorial jurisdiction over Behring Sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters thereof. Great Britain denied the territorial jurisdiction of the United States and denied that the United States

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had a right of property in the fur seals while on the high seas during their progress to or from the islands of St. Paul and St. George, and it became necessary to resort to international regulation to prevent the extermination of the seals. Indeed, it appears that the treasury agent in charge made a report to the Secretary of the Treasury after the season of 1890, in which he strenuously urged the necessity of stopping sealing for a number of years absolutely upon the islands as a necessary measure for the preservation of the seals. On the 15th of June, 1891, an agreement for a *modus vivendi* was concluded between the Government of the United States and the Government of Her Britannic Majesty, "in relation to the Fur Seal Fisheries in Behring Sea," (27 Stat. 980,) whereby with a view to promote the friendly settlement of the questions between the two Governments touching their respective rights in Behring Sea, "and for the preservation of the seal species," it was agreed that seal killing should be prohibited until the following May, altogether by Great Britain, and by the United States, "in excess of seventy-five hundred, to be taken on the islands for the subsistence and care of the natives." This was followed by a convention submitting to arbitration the questions concerning the jurisdictional rights of the United States in Behring Sea; "the preservation of the fur seal in, or habitually resorting to, the said sea," and the right to take such seals, which was proclaimed May 9, 1892. 27 Stat. 947.

And under the same date the *modus vivendi* was renewed during the pendency of the arbitration. 27 Stat. 952.

The arbitral tribunal sat in Paris in 1892-3, and the prohibition covered the killing period for which recovery is sought in this case.

The learned Circuit Judge held that the limitation under the *modus vivendi* was not a designation by the Secretary, but was a prohibition by the Government; and, consequently, that if the lessees had not received any skins the action could not have been maintained. But he held that as the seventy-five hundred skins were received by the lessees they must make compensation for them; that a proper way to deter-

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mine this was to ascertain what the fair product of the year, which might safely be taken, was, and compute what each skin would have cost the company, assuming they had taken that number; and by this mode of computation, having found that 20,000 might properly have been taken, he reached the sum of \$94,687.50 as the amount due to the Government.

The Circuit Court found that the United States, pursuant to the *modus vivendi*, "prohibited and prevented the said company from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease." We think this so far partakes of a conclusion of law that we are not shut up to treating it as a finding of fact. The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power, subject to which the lease was taken, and if the Government found it necessary to exercise that power to the extent which this finding asserts, and if we assume that the company might thereupon have treated this contract as rescinded, it is sufficient to say that it took no such position, but accepted the performance involved in the delivery of the seventy-five hundred skins. The company did not wish to rescind or abandon, and it could not but recognize that, as the *modus* was entered into in an effort to save the seal race from extermination, and thereby to preserve something for the future years of the lease, the prohibition was so far for its benefit.

Again, although the Government acted in making the lease by the hand of the Secretary, it was the real contracting party, exercising the power of regulation through the Secretary, so that it was immaterial whether the Secretary on his own judgment or in compliance with the will of the Government confined the number of seals taken in the year 1893 to seventy-five hundred. Undoubtedly the Government could have directed the Secretary by law to restrict the killing to seventy-five hundred seals, and the treaty was nothing more.

The company could not object that the Secretary was constrained to impose the limitation, for the Secretary was bound to obey the instructions of his principal, and the company

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could not make it the subject of a contest *in pais* as to whether the preservation of the herd in fact required the limitation. The whole business of taking seals was conducted under the supervision of the Government, and by section 1973 the Secretary was authorized to appoint agents, who were charged with the management of the seal fisheries.

The record shows that instructions were issued to the Government supervising agent on April 26, 1893, and a copy delivered to the superintendent of the company before the commencement of the season of that year. These instructions directed the number of seals to be taken during the season of 1893 to be limited to 7500. It was stated by the Secretary that it was believed: "That if the killing be confined between the first of June and the tenth of August, a better quality of skins would be obtained and less injury would be done to the rookeries;" and he added: "This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interests and those of the Government in the preservation of the fur seals being identical."

In the letter of the attorney of the company of November 15, 1893, he said: "During the present year this company, in strict compliance with the orders of the Treasury Department, restricted its catch to 7500." In other words, it appears that both parties regarded the Secretary of the Treasury as authorizing the taking of 7500 skins in the year 1893.

Under the law of 1870 and the various sections of the Revised Statutes the power was expressly reserved to the Government to make whatever restrictions of the business it might see fit to make; the lease recognized this to the full extent; and it was, moreover, expressly stipulated that the company was not to kill or permit to be killed a greater number than the Secretary might authorize. The company was offered 7500 skins for 1893; took them; paid the amount fixed by the Secretary under the lease for compensation to the natives for taking and loading the skins, and subsequently tendered the sum of \$23,789.50 as, according to its computation, the full amount due under the lease. These particular

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seals were killed by the Government agent, but notice of the killing, from time to time, was given to the company, and the company requested to select the skins it desired, which it did. The Government did not regard the lease as broken, but proceeded under it, and delivered the 7500 skins as full performance of the covenant on its part, for the privilege of taking the seals was subject to such limitation on the number as the Government believed it necessary to impose; and the company acquiesced in that view by taking the 7500 skins without dissent.

It was after this that the question arose, not of breach of contract, but as to what sum, if any, was due from the company under the lease more than it had tendered. Was the company entitled to a reduction on what it had agreed to pay, and, if so, how much?

3. Finally, the company claims that the United States are liable to it in damages to the extent of \$287,725, for skins it could have taken during the season of 1893, without unreasonable injury to or diminution of the seal herd, and which the United States prevented it from doing; and that it can avail itself of this claim in this suit by way of recoupment and counterclaim.

The Circuit Court rejected this counterclaim on the ground that the claim had not been presented and disallowed by the accounting officers of the Treasury, and dismissed it, not on the merits, but without prejudice. The company prosecuted its writ of error from the Circuit Court of Appeals for the Second Circuit, and assigned as errors, among others, that the Circuit Court erred in adjudging that its claim for damages was not duly presented; that the court did not allow its counterclaim; and that judgment was not directed in favor of the company. From what we have already said it will have been seen that we are of opinion that the company cannot maintain this claim for damages, and that, assuming that the claim had been duly presented and disallowed, and that, if meritorious, it might be availed of by way of recoupment in this action, the Circuit Court erred in its disposition of the counterclaim.



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The seal fisheries of the Pribiloff Islands were a branch of commerce and their regulation involved the exercise of power as a sovereign and not as a mere proprietor. Such governmental powers cannot be contracted away, and it is absurd to argue that in this instance there was any attempt to do so, or any sheer oppression or wrong inflicted on the lessee by the Government in the effort to protect the fur seal from extinction.

The privilege leased was the exclusive right to take fur seal, but it was subject, and expressly subjected, from the beginning, to whatever regulations of the business the United States might make. If those regulations reduced the catch, the company was protected by a reduction of the rental, and paid taxes and per capita only on the number taken. The other expenses to which it bound itself were part of the risk of the venture. The catch for 1893 was lawfully limited to seventy-five hundred, and the company accepted and disposed of the skins. It cannot now be heard to insist that that limitation was in breach of the obligations of the Government, for which, though still claiming the contract to be outstanding, it is entitled to recover damages.

*The judgment of the Circuit Court is reversed and the cause remanded with a direction to enter judgment in favor of the United States for \$76,687.50, with interest from the first day of April, 1894; and to enter judgment in favor of the United States on the counterclaim.*